# NOMINATION—FCC

# HEARING

BEFORE THE

# COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

SECOND SESSION

ON

STEPHEN A. SHARP, TO BE A COMMISSIONER, FEDERAL COMMUNICATIONS COMMISSION

SEPTEMBER 22, 1982

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# NOMINATION—FEDERAL COMMUNICATIONS COMMISSION

WEDNESDAY, SEPTEMBER 22, 1982

U.S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION,
*Washington, D.C.*

The committee met, pursuant to notice, at 9:32 a.m., in room 235, Russell Senate Office Building, Hon. Bob Packwood (chairman of the committee) presiding.

Staff members assigned to this hearing: Anne G. Cantrel, staff director, and Tom Cohen, minority professisonal staff member.

## OPENING STATEMENT BY THE CHAIRMAN

The CHAIRMAN. The hearing will come to order.

This is a hearing on the nomination of Stephen Sharp for a term on the Federal Communications Commission which does expire June 30, 1983.

Mr. Sharp's biography is extraordinary in terms of his background in the broadcasting industry and at the Federal Communications Commission. Here to introduce him today is his good friend, Senator John Warner.

John.

## STATEMENT OF HON. JOHN W. WARNER, U.S. SENATOR FROM VIRGINIA

Senator WARNER. Thank you, Mr. Chairman.

It is my pleasure to introduce Mr. Sharp to you and other members of the committee. He has been nominated by the President, as the Chair stated, to be a Commissioner at the FCC.

He is presently serving, Mr. Chairman, as the General Counsel for the FCC. Though Mr. Sharp grew up in the State of Ohio, he had the wisdom to come to Virginia to receive his education.

He showed further good judgment by attending Washington Lee University from which I graduated many years ago and, if that wasn't enough, he then continued to follow in my footsteps and went on to the University of Virginia where he attended law school.

Mr. Sharp first went to work for the FCC in 1973 as an attorney in the Legislative Division of the Office of General Counsel. In 1976 he became Legal Assistant to FCC Commissioner, Margita White, and served in that capacity until 1978 when he left the Commission to enter private practice with the firm of Schnader, Harrison, Segal & Lewis.

Mr. Sharp served in the office of President-elect Reagan as a transition team captain for the U.S. Railway Association and as a member of the FCC transition team.

He is a member of the Administrative Conference of the United States and the Federal Legal Counsel.

Mr. Sharp was a visiting lecturer in communications law at the University of Virginia and George Mason University. He currently serves as a council member of the American Bar Association of Administrative Law and chairman of the Political Campaign Election Law Committee of the Federal Bar Association.

He is a member of the Virginia, District of Columbia, and Supreme Court Bars.

Mr. Chairman, it is a privilege for me to unequivocably endorse this outstanding American for this very important position. I urge the members of this committee to promptly send his name to the whole of the Senate where I am sure he will be confirmed.

The CHAIRMAN. Senator, it is good to have you back with us on this committee and we miss you.

Senator WARNER. Thank you, Mr. Chairman.

The CHAIRMAN. Should you have any such entertaining thoughts we would be happy to have you back again next year as a member of the committee.

Senator WARNER. Well, Mr. Chairman, I will entertain that, but your punctuality is more than I can take.

The CHAIRMAN. Thanks again, John, for coming.

Mr. Sharp, do you have a statement?

[The biographical sketch follows:]

BIOGRAPHICAL SKETCH OF STEPHEN A. SHARP

Address: 204 W. Walnut St., Alexandria, Virginia 22301.

Date of birth: June 10, 1947, Columbus, Ohio. Married to the former Lynn Cawley, 1 child, Sarah Cawley Sharp, age 7.

Education: Washington and Lee University, 1965–1969, B.A., 1969 University of Virginia, 1969–1973, J.D., 1973.

Employment: August 1969 to September 1969: News Reporter, WELK (AM), Charlottesville, Va.

May 1970 to November 1970: Communications Director, Dunn for Governor Campaign, Memphis and Nashville, Tenn.

November 1970 to December 1970: News Secretary and Special Assistant to the Governor-elect, Nashville, Tenn.

June 1971 to June 1972: Student assistant to Reuben Clark, Visiting Lecturer, School of Law, University of Virginia, Charlottesville, Va.

June 1972 to January 1973: Legal Clerk, Office of the General Counsel, Federal Communications Commission, Washington, D.C.

January 1973 to February 1974: Law Clerk Trainee/Attorney, Office of the General Counsel, Federal Communications Commission, Washington, D.C.

February 1974 to September 1974: Counsel, Impeachment Inquiry, Committee on the Judiciary, House of Representatives, Washington, D.C.

September 1974 to January 1975: General Attorney, Office of the General Counsel, Federal Communications Commission, Washington, D.C.

January 1975 to 1976: Trial Attorney (General) Office of General Counsel, Federal Communications Commission, Washington, D.C.

December 1976 to December 1978: Legal Assistant to Commissioner Margita E. White, Federal Communications Commission, Washington, D.C.

August 1977 to present: Visiting Lecturer (formerly called Adjunct Professor); School of Law, George Mason University (formerly International School of Law), Arlington, Va.

December 1978 to May 1981: Attorney-at-law, Schnader, Harrison, Segal & Lewis, Washington, D.C.

August 1979 to August 1980: Lecturer in Law, School of Law, University of Virginia, Charlottesville, Va.

May 1981 to present: General Counsel, Federal Communications Commission, Washington, D.C.

MEMBERSHIPS

Virginia State Bar; District of Columbia Bar; and U.S. Supreme Court Bar.

American Bar Association: Section of Administrative Law: 1981 to present, Council Member, 1980 to 1981, Chairman, Committee on Election Law, Special Committee on Election Reforms and Voter Participation 1981 to present, Member.

Federal Bar Association: 1978 to 1981, Chairman, Political Campaign and Election Law Committee; 1980 to 1981, Member, Publications Board; 1981 to present, Member, General Counsels' Committee.

Federal Communications Bar Association.

Alexandria Hospital Corporation (non-profit), Member.

Emmanuel Episcopal Church, Alexandria. Former vestryman, education chairman, usher chairman.

Delta Theta Phi (law fraternity).

## STATEMENT OF STEPHEN A. SHARP

Mr. SHARP. I had a few brief things I thought I might say, Mr. Chairman.

First, I am pleased to be here as the President's nominee to serve as a Commissioner on the FCC. This appointment is a culmination of my background and experience. But I must say 10 years ago when I started work at the FCC as a GS–5 law clerk I could hardly foresee this eventuality.

My years as an FCC staff member have given me appreciation for its history and tradition as an independent agency. I have observed the collegial nature of the body—each Commissioner independently deciding what position to take on an issue, but cooperating with the other Commissioners to arrive at a consensus.

I have seen the necessity of attracting and retaining the best talent, regardless of political party affiliation in order to adjust and redefine the regulatory scheme to changes and technology in the marketplace.

It is particularly clear that this agency needs to work closely with Congress. FCC policy, structure, and procedures must evolve to meet a changing environment and we need the interest and guidance of the Congress. I look forward to regular discussions with Congress on the future direction of telecommunications policy and cite as an excellent example of cooperation between the FCC and Congress the recent enactment of H.R. 3239, the first major Commission initiated legislation to pass Congress in 22 years. My staff in the General Counsel's Office worked closely with committee staffs and I am grateful for the assistance we received. With this cooperative spirit we can do a lot more.

We at the FCC are called upon to decide what serves the public interest. This elastic phrase has been the touchstone of every Commission action since 1934, yet it is perceived differently by different people in different times. I have concluded that generally the public interest is served best where Government is least involved and interfering with either the economic marketplace or the marketplace of ideas.

When the businessman must rivet his attention on the demands of Government, he cannot focus on improving his service to the public. When the broadcaster makes journalistic decisions based on

whether the Government will force the deletion of other programing to make room for mandated response time, the public interest is not well served.

Having said this, however, I recognize that the public interest must be determined within the established statutory framework. Thus, I will continue to adhere to the policy I have maintained as general counsel. I will vigorously enforce all statutory and Commission requirements, including those I seek to change.

I look forward to the opportunity to vote for new service to the public, to eliminate unnecessary and burdensome regulation and to join in working for legislative changes that will benefit the public.

Thank you.

The CHAIRMAN. Thank you.

Mr. Sharp, I have some questions and I may have some for Senator Cannon to ask if he does not arrive.

The Office of Management and Budget has made efforts to reduce the FCC's role in the area of promoting equal opportunity in the industry. What is your position on that issue?

Mr. SHARP. I worked with our Managing Director's Office and the Broadcast Bureau and earlier this year we went to the Office of Mangement and Budget and requested additional time to study the matter. They gave us additional time up until 1983. The Commission staff and the Broadcast Bureau is currently looking at these EEO regulations and they have not brought back to the Commission a draft proposal.

The CHAIRMAN. Thank you.

As you are aware, the FCC's Advisory Committee report on minority ownership was issued last spring. What is the status of that report?

Mr. SHARP. A number of parts of that report are in varying stages of implementation. With respect, for instance, to tax certificates——

The CHAIRMAN. What kind of certificates?

Mr. SHARP. Tax certificates. My office is preparing a draft for the Commission on that recommendation. Other offices in the Commission have responsibilities for each of those parts, and I expect to see those up sometime in the middle of the fall.

The CHAIRMAN. What is your position on the issue of increasing minority ownership in the communications industry?

Mr. SHARP. I favor it.

The CHAIRMAN. What more do you think the FCC could do in pursuing the expansion of that ownership?

Mr. SHARP. I think the report on minority ownership gave us some excellent ideas which I think we ought to pursue. I think the tax certificate policy is a good policy in particular because it is a positive thing, it is an encouragement. I would like to see ideas where we encourage people to do things rather than forcing them to do things they would rather not do and the tax certificate is one of those.

I think also that the FCC can act very helpfully in encouraging capital to flow into this area and to encourage minority enterprise.

The CHAIRMAN. On January 16, 1981, the Commission issued a second notice in docket 79-252 which proposed deregulating competitive services and carriers. The comment period ended May 1,

1981, and action on this docket was origially scheduled for the meeting of July 29, 1982, but the item was withdrawn. Can you tell us the reasons for the withdrawal and when we can expect to see final action on this docket?

Mr. SHARP. The reasons for withdrawal I cannot give you in any detail simply because the withdrawal was done at the request of the Common Carrier Bureau. My understanding is they will be coming up shortly. Beyond that I don't know. I can certainly find out.

The CHAIRMAN. So you had no direct involvement in the withdrawal at all?

Mr. SHARP. No, sir.

The CHAIRMAN. All right.

There are those who recognize that the FCC has been shaping much of our present policy in international telecommunications. The FCC's recent decision applying many domestic deregulatory policies to the international arena is one notable example. Some would argue that the FCC's role must be limited in such policymaking since it is a regulatory agency and not an agency of the executive branch. What role do you see for the FCC in international telecommunications policy?

Mr. SHARP. International and domestic telecommunications policy find themselves getting more and more intertwined and that, obviously, creates problems in terms of regulatory scheme. A competitive scheme domestically does not necessarily translate into the best scheme internationally. There are a number of considerations such as comity and other interests involved internationally that you do not find domestically.

The FCC traditionally has lent its expertise and given support to the State Department and the Department of Commerce and I think we have a fairly good working relationship with those agencies at a staff level that I think is most important.

Ultimately the problem is there is not one decisionmaker. The FCC has an independent jurisdiction over domestic regulatory decisions in the country, the State Department is in charge of conducting our foreign policy and the Department of Commerce has responsibilities through its lead role in the IRAC in terms of frequency allocation. So necessarily all three have to cooperate and cooperation I think is the key here.

The CHAIRMAN. You are familiar with the *Simon Geller* case?

Mr. SHARP. Yes, sir.

The CHAIRMAN. Do you agree with that decision?

Mr. SHARP. Yes, I do.

The CHAIRMAN. Why?

Mr. SHARP. Rather than getting into detail because the case is on reconsideration and I would probably have to sit on it, I will say two things about the *Simon Geller* decision.

The first thing is that had your bill, S. 1629, been passed, I don't think we would have had a *Simon Geller* decision. I think that case points up very clearly the need for this type of legislation and the impossibility of comparative renewal hearing.

The second point quite simply is that the Commission is forced to make hard choices in these things. Again, without getting into the specifics, I think that the Commission had to make a choice here

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based on all the factors involved on the record and they agonized over it. I can tell you that. The Commissioners worked very hard, looked at all the details and spent an awful lot of time on this decision, and I think they felt that they really had no choice.

The CHAIRMAN. I realize you may be involved in this case. If I understand your answer correctly you are saying that you agree with the decision because you think the decision followed the law, but you are not so sure you agree with the law.

Mr. SHARP. You know, it is a tough situation when you have equities involved like this. You have a very sympathetic individual, but I don't think, as you pointed out, that the law gives us much opportunity to maneuver there. I think that the law was clear and I think the Commission followed it.

The CHAIRMAN. We frequently ask the Chairman and often the members of the Commission for their suggestions as to what the law ought to be, and on occasion we get it when we don't ask what their opinion is.

Do I take it you would change the law?

Mr. SHARP. I would change the law, yes, and I think that your bill was the change that was needed, and, unfortunately, it didn't make it all the way through in this session.

The CHAIRMAN. It seems to me that *Simon Geller* points out almost an internal inconsistency. If we are going to say that every station, no matter how many the market has, has to have roughly the same kind of public service programing in terms of news, weather, traffic, or whatever you choose to call it, that you are not going to get variety but you are going to get 40 stations that have all got the same traffic reports and ACU-weather and United Press International news. They will do it if that fulfills the commitment, but I am not sure it fulfills the need for diversity.

Mr. SHARP. I think you have made a good point.

The CHAIRMAN. I understand that some of the direct broadcast satellite applications that the Commission is acting on will be authorized as broadcasting services. Does that mean that those applications will be subject to the content regulations of fairness and equal time?

Mr. SHARP. If they are broadcasters they will be subject to the those requirements. Certain applicants have requested broadcast status, and in our report and order we said that we would allow an applicant to choose its status because it is an experimental service.

The CHAIRMAN. And if they choose to be broadcasters you are going to apply the same standards that would apply, at the moment, to other broadcasters. Whether or not you agree with the standards is not your function.

Mr. SHARP. Yes, sir.

The CHAIRMAN. Let me ask some questions now for Senator Cannon.

Didn't the U.S. Supreme Court earlier this year uphold the Commission's interpretation of reasonable access in the case of Carter-Mondale?

Mr. SHARP. Yes, sir.

The CHAIRMAN. Isn't it true that the Commission in Carter-Mondale interpreted this provision to give Federal candidates reasonable rights of access?

Mr. SHARP. That is correct.

The CHAIRMAN. Is it not true that the Commission in Carter-Mondale found that the broadcasters could not arbitrarily restrict a candidate's efforts to present his candidacy?

Mr. SHARP. That is also correct.

The CHAIRMAN. And is it not true that the Commission has stated that blanket rules by broadcasters limiting access to Federal candidates are suspect?

Mr. SHARP. Yes, the Commission's decision said that.

The CHAIRMAN. Now who has the burden of proving whether a candidate's request is unreasonable?

Mr. SHARP. A burden in that case is a divided burden.

The CHAIRMAN. Is a what?

Mr. SHARP. It is a divided burden, Senator. When you have a complaint that comes in that reasonable access has not been accorded, the complaint has to make certain basic statements so that the Commission knows what is going on at which point an inquiry is sent to the licensee. In effect the licensee carries that burden at this point.

The CHAIRMAN. Well, when you say it is a divided burden, as far as the person who wants access, it is a very limited burden.

Mr. SHARP. That is correct.

The CHAIRMAN. The person comes in and he or she says I asked for time on WQX and I am willing to pay for it and they wouldn't give it to me. Now they have met their burden at that stage.

Mr. SHARP. At that point, yes. It is a very limited burden, the threshold.

The CHAIRMAN. Yes, it is. We had the money and we asked for the time. We are prepared to pay for it and they wouldn't give it to us because it was November and they are not going to take any ads until April or whatever the decision may be.

Now since the broadcaster, in essence, bears the burden of showing that the request is not reasonable, what does the Commission require that the broadcaster show to justify their denial of access?

Mr. SHARP. Well, the Commission would look at the totality of circumstances. For instance, let's say you have a broadcaster in New York City and a candidate for Congress in a county that is served by the New York City television station. The question concerning reasonableness may not be in not selling time at all to a candidate, but say that you asked for a flight of 40 1-minute spots and the broadcaster will give you six, and the candidate says that is not enough. Then we get into whether or not 6 is enough or 40 is too much and so forth.

The broadcaster's job at that point is to come in and explain why it picked 6 and not 40. Then the Commission has to determine whether the broadcaster was reasonable in making that determination. In a metropolitan area where there may be 40 or 50 Congressional races, plus maybe one or two Senatorial races and other races at the same time, that decision may be more reasonable than at a station that has only one race in a particular district.

The CHAIRMAN. On this issue you are saying that the station can make a decision which is not really determinative of whether the candidate needs the broadcast time. Indeed, the candidate may have made that decision and from the candidate's standpoint it

may be justifiable. But what you are saying, if I understand it, is from the broadcaster's standpoint the broadcaster is saying, look, I cannot take 30 campaigns if they all have money and they all want to advertise in November. I am going to have to put on more advertising than I should or kick off some of my commercial broadcasts or commercial advertising accounts or something. You are saying that there is a factor other than determining when the campaign is ripe, because any candidate who is convinced that the campaign is right now or last week or last month, and campaigns start years ahead of time, that the broadcaster is entitled to some presumption in addition to the campaign right and part of it is his or her own business needs.

Mr. SHARP. Well, I wouldn't necessarily characterize it as a presumption, Senator. The Commission has to look at the broadcaster's reasonableness. The broadcaster makes a decision. Was that decision reasonable in light of all the circumstances and an important circumstance is the need of the candidate.

The CHAIRMAN. And clearly in Carter-Mondale it wasn't reasonable when they said you can't have any time

Mr. SHARP. Absolutely.

The CHAIRMAN. We are not ready to go until January. The fact that you are ready to go doesn't matter.

Mr. SHARP. That case also was complicated by the fact that the networks when they said "no" were in the middle of covering the campaigns and it made it a little more difficult to establish reasonableness.

The CHAIRMAN. I am trying to recall. What was the Commission's justification for jurisdiction over the networks on that since they are not licensees, or was the issue ever raised?

Mr. SHARP. Well, the issue was raised but it sort of disappeared as it went up to the Supreme Court.

The CHAIRMAN. You would have no power over the networks, would you?

Mr. SHARP. Traditionally the Commission has taken jurisdiction only through the back door. The Commission has jurisdiction over all licensees. The networks have owned and operated stations and the networks have affiliates. The networks as a matter of accommodating their customers or affiliates find it convenient, as do the affiliates, to take care of all the complaints that come based on network programing. So the Commission has dealt directly with the networks rather than having complaints filed against each of several hundred licensees. But the Commission until Carter-Mondale had not asserted direct jurisdiction over the networks.

The CHAIRMAN. Did you in that case?

Mr. SHARP. The Commission asserted jurisdiction over the networks. I am trying to recall whether the Court of Appeals addressed that issue. I know the Supreme Court did not.

The CHAIRMAN. I am not sure the networks raised the issue in the briefs in the Supreme Court.

Mr. SHARP. I am not sure they did either. I frankly do not recall that specific point.

The CHAIRMAN. They have regarded it as a moot issue realizing that you could come through the back door if you wanted, and if you wanted to start bringing in all of their affiliates and their

owned and operated stations you could achieve the same result in any event. So perhaps it wasn't worth the hassle. But I was curious what the FCC's alleged jurisdiction over the networks was.

Mr. SHARP. Well, the jurisdiction was based, as I understand it, and again I am reaching back into my memory of this case which I haven't read for at least a year, was that the interest of the Commission, and they were charting a series of cases involving networks back into the 1940's and suggesting that in fact the Commission did have a direct jurisdiction over the networks simply based upon the fact that the networks were an extension of the licensee and I am not sure whether it was simply because of the network dominance issue that the Commission had used before back in the 1930's that they were trying a direct route. I can certainly look at that again for you and get you a better answer.

The CHAIRMAN. No. I think it is enough because I think you could have gotten jurisdiction through the back door had you so chosen. I think the networks realized it and realized that sooner or later they would have to face the issue up and down anyway. So why raise an issue that was easily circumvented and you would get to the substance eventually.

I assume as a Commissioner you will continue to enforce this doctrine of candidate access to the media.

Mr. SHARP. As long as I am a Commissioner I will uphold the statute and will see that it is upheld honestly and forthrightly.

The CHAIRMAN. Now let me ask some further questions for Senator Cannon. This is on fairness.

Is it not true that a broadcast by an independent group, one not connected to a candidate, or a broadcast by supporters of a candidate in which another candidate is mentioned fall within the fairness doctrine, and more specifically the Zapple doctrine?

Mr. SHARP. The way the question is worded the answer is both in some cases. The fairness doctrine applies to time, either purchased or given, to independent political committees, unless you are in an election period. If you are in an election period, then the so-called Zapple doctrine would apply.

There is a difference between the fairness doctrine and the Zapple doctrine. The fairness doctrine is an issue oriented doctrine based on a controversial issue of public importance. The Zapple doctrine, on the other hand, is a corollary to the political broadcast law, say section 315(a) the equal opportunities section. Zapple is what is known as a quasi-equal opportunity and is really geared to the supporters of candidates rather than to the issue involved.

The CHAIRMAN. I just asked that first question, Howard, on the second page.

Senator CANNON. Well, does the fairness doctrine give supporters of the candidate mentioned in the independent groups' advertisements a general opportunity to reply?

Mr. SHARP. Under the fairness doctrine there is no direct right of reply under the CBS versus DNC case. However, if there is a personal attack, then that aspect of the fairness doctrine would apply and there would be a reply obligation.

Senator CANNON. Well, now what about a personal attack. Aren't they all personal attacks? Any of them that I have seen have all been personal attacks.

Mr. SHARP. The characterization of personal attack is one which the victim finds a great deal more subjectively than the particular rule that the Commission applies. What the rule is is that there must be an attack on a person's honesty, character, integrity or like or similar personal qualities.

Senator CANNON. Such as?

Mr. SHARP. For instance, a personal attack in one case involving Straus Broadcasting was alleged to be where they called a Member of Congress a coward. That was considered a personal attack. Another part of the rule, however, is that the attack must occur during the discussion of a controversial issue of public importance. So in that case the court overturned the Commission's finding that there was a personal attack by saying that it wasn't during that discussion. Another instance was calling someone a Communist or similar terms.

Senator CANNON. Well, suppose they just make an accusation with respect to voting which is a flat out lie. Is that a personal attack?

Mr. SHARP. If it were suggesting that the individual in terms of voting was dishonest or lacking in integrity, yes. If it is simply a misstatement of fact, it is not a personal attack but can be answered some other way.

Senator CANNON. Well, at what rates would those supporters be charged?

Mr. SHARP. The independent committee who is putting this spot on would be charged at the full commercial rate as would anyone seeking reply time, unless the candidate seeks reply time with a use, which is the candidate's appearance either by voice or image.

Senator CANNON. If he seeks that time to reply by voice or image would he be entitled to the lowest rate then?

Mr. SHARP. Yes, sir.

Senator CANNON. Is there any limit on the amount of time that he could get at that lowest rate?

Mr. SHARP. The amount of time limited to the lowest rate goes back to your earlier questions about reasonable access, and that is a judgment call. First, the licensee has to suggest that it is not reasonable and then the Commission has to uphold the licensee's judgment. However, there is a great deal of weight given to the candidate's needs.

Senator CANNON. Congress passed that lowest unit charge provision to forward the political dialog and help insure that the electorate is well informed. Doesn't the requirement that a candidate through his supporters pay rates higher than the lowest unit, fly in the face of this 315 lowest unit charge requirement?

Mr. SHARP. Well, Senator, it would appear to be a situation where you have a several-tiered scheme or political broadcast regulation, and like many regulations, it has grown like topsy. As the law is structured now, the statute does not extend lowest unit charge to supporters. It only extends it to candidates where there is a use.

Senator CANNON. Well, let's pursue that a little bit. Suppose the station says OK, we are going to sell to both sides so much time at the lowest unit rate and that is for you to come on individually as

a candidate and make your own presentation. But over and above that we will sell you all the time you want at the higher rate.

Mr. SHARP. If the station made that offer, the station must sell to the candidate and, by operation of law and the Federal Election Commission the candidate's principle committee, the station must sell all time at the lowest unit charge.

Senator CANNON. To the candidate?

Mr. SHARP. To the candidate. But in order to qualify for the lowest unit charge there must be what is a term of art known as the "use," that is the candidate's picture or voice used in some part of the spot.

Senator CANNON. Just used in some part of the spot. The whole spot doesn't have to have the candidate's picture throughout?

Mr. SHARP. That is correct, sir.

Senator CANNON. Nor does his voice have to be the only voice on that spot?

Mr. SHARP. That is right.

Senator CANNON. Well, I am glad to get this clarified a little bit. You know, we had a little election in Nevada last week.

Mr. SHARP. I noticed.

Senator CANNON. I never realized how many people in groups throughout the country were so concerned about the welfare of the voters of Nevada. The voters were very lucky indeed. They received all sorts of help and advice and assistance from such civic minded groups as the National Conservative Political Action Committee and others, and you know the really nice thing is that all this help and advice came without any request from anyone in Nevada. It was just a spontaneous gesture to help out the democratic process. I was really touched.

I haven't seen such a generous move since the Russians decided to assist the people in Poland.

In any event, to make a long story short, the State of Nevada was inundated with television and radio commercials in the last few weeks of the primary all of which were negative and directed against me and most of which were paid for by NCPAC at the top commercial rates.

Now the theme of the advertising campaign was to try to convince the voters that I have a poor attendance record in the Senate. As my colleagues on the committee can certainly attest, this is simply not true. My record in 24 years is one of the best in the Senate. Nevertheless, hour after hour and day after day the NCPAC ads would drone on and ask the question, "Where is Senator Cannon?" and "Where is Howard?" all over again.

Well, in fact these got to be so tiresome and boring that the local radio talk shows discussed them frequently with their listeners. Finally a woman called the talk show program to complain about the ads, and this is the truth, she was incensed. She called to report that after months of trying to teach her child to talk he had just uttered his first complete sentence, "Where is Howard?"

I have come from my recent primary having experienced a broadcasting campaign that was unprecedented in my 24 years in the Senate. I can see how necessary broadcasting is to a modern campaign, and how crucial the political broadcasting laws are to insuring that the electorate is well informed.

The fact is that one cannot get elected without television and radio. But the second fact is that broadcasters are businessmen who's job it is to make a profit and, unless otherwise directed, have every incentive to sell as much of the most expensive advertising time as they can.

It is clear to me that without the political broadcasting laws, people running for office might never be offered air time. And even if they were, it might be at rates that only a few of the rich could afford. In the end, such an unguided system—one that depends on the pure beneficence of broadcasters—would severely skew the already suspect balance in elections, shortchanging the electorate in making an informed choice.

Not only are the political broadcasting laws necessary, I believe we need to find ways to beef them up. It is one thing to run against well-financed opponents. It is quite another thing to run against supposedly independent groups that have extremely deep pockets and are willing to pay such high rates to get on the air. Even some of the most publicly minded broadcasters could not refuse the attractive advances of these groups. While such independent efforts fall within the fairness doctrine, they still crowd out time that should be devoted to candidates discussing the issues.

More importantly, they cause candidates to respond at rates higher than the lowest unit charge—the rate Congress intended to apply to candidates for elected office. If changes are not made to correct this fundamental problem, only the very rich could afford to run against well-financed opposing candidates and the well endowed so-called independent groups. Obviously, the political process was never intended to be so warped.

But I think there really is a fine distinction, and I am glad to get you on the record. It is a fact that the stations initially attempted to limit the amount of time they would sell to each candidate. I think that is good, because, as you know, I have been trying to limit the amount of expenditures that could be made in the political process for a long period of time and the Supreme Court didn't let us go ahead with that.

But be that as it may, each side was sold an amount of time at the minimum rate. Then when it got close to election, the flood gates were open. You could buy all the time you wanted at the higher rate but no more time at the minimum rate. It seems to me that that is clearly outside of what the intention of the law was.

Now if a picture or a voice has to on there, we can sure put it on for part of that ad, but I think it is very unfortunate that there was some ducking of what the intent of the law was.

With that said, it is a pleasure to welcome you Mr. Sharp. I understand there was a small misunderstanding concerning your nomination. I don't know what accommodations were made to facilitate this hearing and I certainly wouldn't want to speculate or spread any rumors. But I do hope you enjoy the mild Washington climate which differs greatly from what I understand is your new residence in Alaska.

Now I hope as a Commissioner that you will vigorously enforce the provisions of the law as you have defined them here.

Mr. SHARP. I have so stated and I will do so.

Senator CANNON. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Howard, and congratulations.

Senator CANNON. Thank you.

The CHAIRMAN. Mr. Sharp, I have no more questions. I appreciate you coming and thank you for bringing your wife and your daughter. She can get back to school now. We appreciate it.

Mr. SHARP. Thank you very much.

The CHAIRMAN. Next we will hear the testimony of Mr. John Hemenway, the assistant to the chairman for Accuracy In Media.

## STATEMENT OF JOHN HEMENWAY, ASSISTANT TO THE CHAIRMAN, ACCURACY IN MEDIA, INC.

Mr. HEMENWAY. Thank you, Mr. Chairman.

The CHAIRMAN. It is good to have you with us.

Mr. HEMENWAY. My pleasure.

As you know, Accuracy In Media opposes the nomination of Stephen Sharp. We have submitted to the committee 3 pages of testimony by Mr. Reed Irvine who is chairman of Accuracy In Media, a membership organization having 25,000 members all of whom are interested in the kinds of issues that have been raised by the committee here today, and in particular the Fairness doctrine.

AIM believes that the role of the FCC in preserving even the modest restraints imposed by the Fairness doctrine is critical. Yet, in recent years there has been a drive on the part of all broadcasters, particularly large broadcasters, to eliminate the restraints imposed upon the media by the Fairness doctrine and the equal time requirements. These movements have gained strength.

We believe that they are motivated by the mere grab for power on the part of those in control of the electronic media and the drive for higher ratings and higher income. All of these conspire against media responsibility as represented in the Fairness doctrine.

Now as I heard Mr. Sharp answering your questions, and obviously he is an articulate man, my thought came to Broadcasting magazine of May 24 which bears exactly on the point you raised, Mr. Chairman, about whether Mr. Sharp as a Commissioner would enforce policies with which he didn't agree.

Broadcasting magazine quotes Mr. Sharp as follows:

> And if he is uncomfortable with some of the rules and laws on the books, he says that has not stopped him and will not from seeing that they are enforced. That is his duty. But it won't always be with enthusiasm. As for the Fairness doctrine, for instance, which he feels has lost any constitutional basis it ever had, he contends the scarcity argument has been overtaken by events, specifically the vast increase in the number and kinds of media. "You hold your nose and you enforce it".

Well, now Accuracy In Media doesn't want a Commissioner who is going to hold his nose to enforce the Fairness doctrine. We don't believe the Fairness doctrine has lost its constitutionality.

The wild abuse of General Westmoreland, which has resulted in a libel suit you all are aware of now pending exemplifies the problem. CBS and NBC, but interestingly not ABC, over the last decade have demanded the right to ignore fairness in order to follow their natural impulses to air one sided hatchet jobs on individuals and institutions as they see fit. Westmoreland is a good example of an attack on an individual.

The FBI has been attacked in the Jean Seberg rewrite of history accusing the FBI of things it did not do.

We demand an informed electorate. Surely that is the mainspring of a Republic such as ours. Such a concept supports Mr. Cannon's remarks on the essential requirement to have fair elections, full access of information and a truly informed electorate.

But in the past year no less a person than the Chairman of the Federal Communications Commission and several of his fellow Commissioners (and of course the Commission's General Counsel, Mr. Stephen A. Sharp), has joined those who seek to have the Fairness doctrine abolished.

Now, Mr. Chairman, I submit that you don't send a man out to administer a program you really want enforced if he doesn't agree with the program. You don't put a goat in charge of a cabbage.

You are considering Mr. Sharp's nomination to the Commission today. AIM urges the committee to show by its vote on the nomination that Congress does not wish to see a continued decline in the efficacy of the Fairness doctrine. AIM urges that the Fairness doctrine continue in force with its enforcement strengthened and not weakened by the appointment of FCC Commissioners who are less than enthusiastic supporters of fairness in broadcasting.

Now, Mr. Chairman, that concludes any necessary remarks by me. The testimony of my articulate boss, Mr. Reed Irvine, who is, unfortunately, out of the city on a trip that was arranged before this was scheduled, speak for themselves.

About a year ago when the FCC did vote against fairness, as we would put it, against the Fairness doctrine, the AIM report, which is put out twice a month by our organization—it is one of our activities—had a rather neat summary of what might happen if we really do abolish the Fairness doctrine, and it goes right to the matters that Mr. Cannon raised, electioneering unfairness in general.

Perhaps you would like to have this appended to our remarks.

The CHAIRMAN. We would like to have it, we will append it to the remarks and put it in the record.[1]

Mr. HEMENWAY. Thank you, Mr. Chairman.

That concludes my comments.

The CHAIRMAN. Theoretically why should fairness apply any more to broadcast than to print?

Mr. HEMENWAY. Well, you could say that the print media should have a great deal more fairness than they, in fact, do. I certainly would. We are at loggerheads with the print media constantly.

The CHAIRMAN. In other words, you think that the Fairness doctrine should apply to print?

Mr. HEMENWAY. Yes, I shouldn't say unfortunately because we support the first amendment in Accuracy In Media, but the Founding Fathers were so concerned with the prior restraints of the old world and the necessity to get a license before you first could publish a newspaper. They wanted to make sure that Congress, as you well know, shall pass no law restricting the press. Fortunately for the health of this Republic, the electronic media weren't even conceived of by the Founding Fathers.

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[1] See p. 21.

The CHAIRMAN. What do you think the Founding Fathers would have thought about prior restraint had they been able to foresee the electronic media?

Mr. HEMENWAY. I think they would have set up something very similar to the Fairness doctrine and they would not have been alarmed by bureaucrats' agonizing cry that it is difficult to administer. Well, you can't tell me that Supreme Court decisions are easy to arrive at concerning the first amendment, the balancing of equities and all of this stuff that our lawyer friend, Mr. Sharp, has just thrown out.

The CHAIRMAN. I want to back up and make sure I understand where you are coming from because we are moving more and more toward the transmission of information electronically, including what used to be printed.

Mr. HEMENWAY. That is true, yes.

The CHAIRMAN. If print moves more and more into the electronic era, if they transmit more and more of their information electronically you are saying they should be subject to the Fairness doctrine?

Mr. HEMENWAY. That is right. It is based on the rationale that I think still is applicable——

The CHAIRMAN. That what?

Mr. HEMENWAY. The rationale that I think is still applicable that caused the FCC to be set up in the first place, the essential scarcity of the electronic media. Now it is argued technically today there is no longer any scarcity and let the marketplace control, this sort of appeal to an innate conservatism of keeping Government off your back and out of your hair. A lot of the people who support AIM are conservatives, but this doesn't have anything to do with the free market economy.

It is a natural scarcity and if not made scarce by the availability of wave lengths, which used to be the argument, it has now become scarce by the stringing of wires, the access to the long lines, the access to the communications satellites and the sheer amount of money that is required in order to get this unlimited access that we are talking about.

The CHAIRMAN. But interestingly the argument is often made, well, anybody can start a newspaper. All he needs is a mimeograph. A 4-page mimeograph sheet is hardly the equivalent of the Washington Post. It might be the equivalent of a CB broadcaster, but not the equivalent of the Washington Post, wouldn't you agree?

Mr. HEMENWAY. Yes, sir. That is a terrible reality that we in Accuracy In Media have to face every day.

The CHAIRMAN. Well, in terms of scarcity in money my hunch would be that it is a lot more expensive to start a major newspaper than it is to buy a radio station.

Mr. HEMENWAY. You can start a one-sheet flyer with the press.

The CHAIRMAN. You can start, yes, and you can start a CB radio with a relatively modest investment.

Mr. HEMENWAY. Yes, but it ends there.

The CHAIRMAN. How many one-page mimeographs have grown into Washington Posts in the last 50 years?

Mr. HEMENWAY. We have to watch the Washington Times and we may be able to assess that.

The CHAIRMAN. But how much of an investment did it take to start the Washington Times?

Mr. HEMENWAY. It took a lot, several million anyway.

The CHAIRMAN. Oh, much more than several million, and U.S.A. Today is going to be more than that. It is not something that your average garage entrepreneur goes into with a mimeograph.

Mr. HEMENWAY. All the more reason then that some instrumentality of the people, which after all were set up by the Founding Fathers to be sovereign in this country, should have some influence as to how the vast resources that are mobilized by these efforts are directed, whether it is unfair—at least a modicum of fairness demands following certain rules. A Fairness doctrine is acceptable.

The CHAIRMAN. Let's come back again. To the extent that information, news or otherwise, is transmitted electronically, you are saying that it should be subject to the same regulations that broadcasters are now subject to?

Mr. HEMENWAY. That would be my personal position. I don't believe Accuracy in Media has an institutional position on this yet. We are concerned with the accessibility of legitimate points of view in issues of importance and controversy reaching the public. I don't myself see any other way of insuring that except through a Fairness doctrine.

The CHAIRMAN. And to the extent, therefore, that you have a direct broadcast satellite and out goes the equivalent of an editorial from NBC on the direct broadcast satellite and it is received by stations, equal time, fairness and the other doctrines apply?

Mr. HEMENWAY. Yes, sir, and that offends some foreign nations. They find our first amendment a rather curious anomaly. I have never met a foreigner who understood why the American people could let Government get away with an unlicensed press.

The CHAIRMAN. As we move toward electronic transmission of information and the Washington Post sends out an editorial on the direct broadcast satellite and it is received broadly, the Washington Post should be subject to equal time and fairness?

Mr. HEMENWAY. We can waltz around the pin, as Mr. Sharp tried to do when you gentlemen threw out a question analogous to that, but it seems to me that someone has to define broadcasting. Personally I would define that as broadcasting. We are all aware that courts don't always agree with common sense.

The CHAIRMAN. No, I think the courts might define that as broadcasting.

Mr. HEMENWAY. Well, I hope so. That would be a refreshing change. Common sense is not always common.

The CHAIRMAN. But to the extent the courts say yes, Katharine Graham, yes, Washington Post, you are now in the position of broadcasting when you do that, and therefore you are subject to fairness, to equal time and to the other restrictions that are put on what we currently called broadcasters.

Mr. HEMENWAY. That would be very healthy to the democratic process in this Republic.

The CHAIRMAN. Thank you. I have no more questions. I appreciate you coming.

Mr. HEMENWAY. Thank you.

[The material referred to follows:]

STATEMENT OF REED IRVINE, CHAIRMAN, ACCURACY IN MEDIA

Mr. Chairman, as founder and chairman of Accuracy in Media, I appear before you today to oppose the nomination of Stephen Sharp. We are a citizens media watchdog organization with over 2,500 active members throughout the country. AIM is vitally interested in the accuracy and fairness of all news media, but we are particularly concerned about broadcasting, since such a large portion of the American public now depend primarily on television for most of their news.

The news media in this country have suffered a dramatic loss of public confidence in recent years. A Harris poll in 1981 showed that only 24 percent of those questioned expressed a great deal of confidence in television news. This was a sharp decline from the 41 percent that expressed great confidence in television news in 1973.

One of the reasons for this decline in confidence is the growing public perception that even our premier television news organizations are often neither accurate nor fair. The American people have been shocked by the revelations about the way in which CBS "broke the rules and got Gen. Westmoreland," to quote the subtitle of the now famous TV Guide article, "The Anatomy of a Smear." Gen. Westmoreland has found it necessary to defend his reputation by filing a $120 million libel suit against CBS. He is confident that he will have no trouble demonstrating in court that CBS acted with knowing and reckless disregard of the truth in producing the program that accused him of conspiracy to understate the strength of the enemy forces we faced in Vietnam in 1967. The revelations that will come out at the trial of Gen. Westmoreland's suit are certain to deal a further serious blow to the confidence of the public in television news.

Accuracy in Media believes that this deplorable situation could have been prevented if the Federal Communications Commission had been vigorous in upholding the Fairness Doctrine. Contrary to the wild assertions made by the opponents of the Fairness Doctrine, this is not a law that permits the government to intrude in the news judgments of the broadcasters. It does not tell the broadcasters what they may or may not put on the air. It simply asks that when they air programs on controversial issues of public importance, such as the CBS program on Gen. Westmoreland, they make a resonable effort to air all sides of the controversy. That is a requirement that has impressed the American people, the Congress and the courts as being eminently reasonable. Those who are most adamantly opposed to it are CBS and NBC, who have over the last decade demanded the right to ignore fairness and follow their natural impulses to air one-sided hatchet jobs on honorable men such as Gen. Westmoreland.

Unfortunately they have now been joined by no less a person than the chairman of the Federal Communications Commission, several of his fellow commissioners, and the Commission's general counsel, Mr. Stephen A. Sharp, whose nomination to the Commission you are considering today.

Accuracy in Media respects Mr. Sharp's integrity and we certainly agree that he has the right to hold the view that the Fairness Doctrine should be eliminated, much as we believe that view is grievously mistaken. However, we believe that this committee should take this opportunity to send a message to the American people and to the FCC. We recommend that you reject Mr. Sharp's nomination to make it clear that this committee rejects the self-serving efforts of the powerful broadcasters to eliminate the fairness requirement that already rests too lightly on their shoulders. By voting against Mr. Sharp, you will send a message to Chairman Mark Fowler that the Senate is not prepared to support his misguided efforts to eliminate the fairness doctrine and the equal time requirements for political candidates and the personal attack rules that provide some modicum of protection for the people.

The broadcasters and their allies are their own worst enemies. They should be deeply concerned about the growing distrust and even hostility that the public feels toward them because of their arrogance and unfair use of their power to destroy individuals and undermine the strength of our country and its institutions and values. It is because we value the freedom of the press that has long been one of the brightest jewels in the crown of liberty that we want to see television and radio broadcasters held to standards of performance that will not bring them into such disrepute that the public demands far tighter controls upon them than have ever before existed. George Watson, the ombudsman for ABC News, one of the major news organizations that has not joined in the broadcasters' campaign for elimination of the Fairness Doctrine, was quoted in the September issue of U.S. News and World Report as saying, "Freedom of the press is probably in bigger trouble than many people in the media understand." In this same article, it was noted that many in the press fear that a hostile public may seek legal changes that would erode First Amendment guarantees of press freedom.

The members of Accuracy in Media, who we believe to be representative of the mainstream of the American people, want to see freedom of the media preserved, but unlike the myopic advocates who would discard all restraints upon the media, they believe that freedom will get a very bad name if it degenerates into license. The media must be free and responsible. The drive for ever higher ratings and income in the broadcasting field is the enemy of responsibility. The lust for power on the part of those in control of this powerful medium is the enemy of responsibility.

We have lived with modest restraint imposed by the Fairness Doctrine and the equal time requirements for over fifty years. These restrictions on the unfettered power of the broadcast licensees have served the American nation well. Regrettably, in recent years, as the television medium has waxed in power and influence, these modest restraints have been increasingly flouted. At the same time, the respect of the public for the media and for the concept of press freedom has declined.

We urge you to show by your vote on the nomination of Mr. Sharp that you do not wish to see this decline continue. We urge you to show that you want to see the Fairness Doctrine continue in force and that you want to see its enforcement strengthened, not weakened by the appointment of FCC Commissioners who are less than enthusiastic supporters of fairness in broadcasting. We urge you to reject the nomination of Mr. Sharp.

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## In Defense of Fairness in Broadcasting

(By David S. Lichtenstein)

One of the fundamental assumptions of a democratic society is the access by the public to channels of informtion which enables an electorate to form intelligent opinions on critical issues affecting their interests.

The impact of broadcasting on the formation of public opinion is indicated by numerous surveys which show that over 70% of the American public obtains its news and forms its opinions on the basis of network television. In an age of ideological conflict we are confronted with a desperate competition among different groups and clashing philosophies for the hearts and minds of the American people. On vitally important issues of national defense, foreign policy, human rights in Latin America, and economic aid to the third world, there is bitter struggle to influence and mold public opinion between radical and conservative intellectuals, teachers, writers and journalists who articulate the positions ultimately taken in network documentaries and political commentary. It has been amply documented that on issues of national importance, the networks have thrown their weight against the inarticulate majority and have supported positions of a minority intelligentsia alienated and hostile to the best interests of the United States.[1]

The actual and potential abuse of power by the three major networks to whom we have granted a monopoly of the air waves constitutes a grave threat to the viability of a democratic society. Insofar as the networks present controversial issues from the exclusive point of view of the reigning establishment[2] from whom network pro-

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[1] See Edith Efron, "The News Twisters" and "How CBS Tried to Kill a Book;" Robert Novak in "The Mass Media" edited by Harry Clor; Peter Braestrup, Big Story; Press, "Politics and Popular Government" edited by George Will (American Enterprise Institute); Shirley Christian, Washington Journalism Review, March 1982; Edward J. Epstein, "TV and the Vietnam War", TV Guide, 1973; TV and National Defense" by Ernest W. Lefever.

For another point of view on investigative journalism, see Katharine Graham, "The Freedom of the Press" (The Granada Guildhall Lectures, 1974, publ. by Hart-Davis, MacGibbon.)

[2] Perhaps a note is in order with respect to the use of the word "establishment". At one time this term carried the connotation of a conservative group of elder statesmen such as the Council on Foreign Relations. Today, the conventional wisdom on foreign policy, so far as the networks are concerned, is to be found in a group gathered around such publications as "Foreign Policy" whose editorial board constitutes the sanhedrin of the liberal intelligentsia (see "The American Intellectual Elite," Charles Kadushin; "On Intellectuals." ed. by Philip Rieff, "Daedalus, Summer 1972," essay by Seymour Lipset; "TV and National Defense," p. 41, 80 on the overwhelming pitch for detente). Professor Lipset of Harvard refers tomost journalists as amongst "marginally intellectual groups who distribute culture" together with teachers and clerics. This is a very perceptive observation, since the networks (in their news and public affairs programs) are indeed wholesale distributors of intellectual products manufactured elsewhere. The product becomes deteriorated in order to be made available for mass consumption. This is inevitable, since ideas originating from the academic world and the intelligentsia have to be translated by Brinkley, et al, into the lowest common denominator for effective distribution to a mass audi-

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ducers of documentaries and political commentary derive their ideology, the American public is deprived of that freedom of discussion which the First Amendment is designed to protect. In a 1981 series of five one-hour programs, "The Defense of the United States", CBS presented a program on national defense that was dangerously lacking in balance. This documentary seemed designed to persuade the public and Congress that nothing the Soviets are doing poses a threat to our security that must be met by increased defense expenditure. While there is a national consensus to the effect that we let our defenses deteriorate dangerously and we have to take strong measures to catch up, CBS maintains that (a) it would be too risky for the Soviets to launch a first strike, (b) that we are prepared to wage a limited nuclear war, but the Soviets are not, (c) that the Soviet military build up is justified, and (d) that the "military-industrial complex" is conspiring to equip our forces with needlessly costly equipment. In the five hours given to examining the plans for a U.S. military build-up, there was no discussion of the Soviet build-up which precipitated it.[3]

As a study by Dr. Ernest W. Lefever points out:

"The narrowing of national debate inevitably limits the options open to the policymaker. Both the President and the Congress are constrained by what Abraham Lincoln called 'public sentiment', without which, he said, 'nothing can succeed'. If the mass media persist in excluding a significant sentiment or preference from public debate, that preference will eventually be ruled out as an alternative deserving serious policy consideration and the policymakers will be virtually forced to choose among those options the media consider worth presenting to the public. The public cannot support an option about which it has little knowledge or awareness." [4]

It is precisely in order to protect the people's right to know that the Federal Communications Commission was persuaded to adopt the Fairness Doctrine. The basic premises of the Fairness Doctrine as stated in the "Report on Editorializing" and repeated in the 1974 Fairness Report are these:

"It is axiomatic that one of the most vital questions of mass communication in a democracy is the development of an informed public opinion through the public dissemination of news and ideas concerning the vital public issues of the day. . . The Commission has consequently recognized the necessity for licensees to devote a reasonable percentage of their broadcast time to the presentation of news and programs devoted to the consideration and discussion of public issues of interest in the community served by the particular station. And we have recognized, with respect to such programs, the paramount right of the public in a free society to be informed and to have presented to it for acceptance or rejection the different attitudes and viewpoints concerning these vital and often controversial issues which are held by the various groups which make up the community. It is this right of the public to be informed, rather than any right on the part of the Government, any broadcast licensee or any individual member of the public to broadcast his own particular views on any matter, which is the foundation stone of the American system of broadcasting."[5]

This statement emphasizes "the paramount right of the public in a free society to be informed and to have presented to it for acceptance or rejection the different" viewpoints on "controversial issues" held by "the various groups which make up the community".

As the Commission pointed out:

"There is no principle of greater importance to understanding the fairness doctrine and the First Amendment than that "(i)t is the right of the viewers and listeners, not the broadcasters, which is paramount". *Red Lion Broadcasting Co.* v. *FCC* 395 U.S. 367, 390 (1969). The fundamental concept which underscores this right is that the continued vitality of a democratic society and its freedoms requires the "widest possible dissemination of information from diverse and antagonistic sources. . ." *Associated Press* v. *United States,* 326 U.S. 1, 20 (1945). We must always keep in mind that "speech concerning public affairs is more than self expres-

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ence, but the key to understanding of network bias is that the producers and network executives look for guidance of controversial issues to the line laid down on foreign and domestic policy by the reigning intellectual elite. In written journalism this would constitute such pundits as Tom Wicker, Anthony Lewis and Marquis Childs. On foreign policy, the line slavishly followed by the networks is laid down by such authorities in the academic world as Robert W. Tucker, John Fairbank, Morton Halperin, Abram Chayes, Leslie Gelb or, the new elders of current foreign policy wisdom, Paul Warnke, Clark Clifford and George Ball, et al.

[3] Joshua Muravchik, Commentary magazine, September 1981.

[4] Ernest W. Lefever, "TV and National Defense," p. 153.

[5] Memorandum Opinion and Order on Reconsideration of the Fairness Report, Mar. 19, 1976, Docket Number 19260.

sion; it is the essence of self-government". *Garrison* v. *Louisiana*, 379 U.S. 64, 74-75 (1964). The relationship of this principle to broadcasting was articulated in *Green* v. *FCC* 447 F 2d 323 (1973). There it was held that the "essential basis of any fairness doctrine, no matter with what specificity the standards are defined, is that the American public must not be left uninformed."[6]

In light of the many years of effort by public interest groups to enforce fairness in broadcasting against the wave of radical bias, it is astonishing to find an apparently conservative chairman of the FCC, Mr. Mark S. Fowler, advocating the abolition of the Fairness Doctrine. Mr. Fowler anticipated criticism from his fellow Republicans and conservatives by asserting that as a conservative, he is bound to support less, not more, restraint "on the Press". Since the issue is one of regulation of broadcasting, Mr. Fowler already precludes an objective answer by surreptitiously shielding broadcasters behind the traditional immunity granted to the print media. In short, he throws the protective coloration of freedom of the press around broadcasting without taking into account the reasons that have led liberals and conservatives alike to recognize that it must be subjected to some governmental regulation. Philosophically, Mr. Fowler rests his case on the ground that true conservatism means less governmental involvement in the lives and affairs of people. True, but Mr. Fowler transmutes this into "no involvement", a radical libertarian view that is rejected by true conservatives.

Apart from philosophy, the main thrust of Mr. Fowler's assault on the Fairness Doctrine is that enforcement of the doctrine involves the FCC in "content regulation". We will return to that in a moment. What does Mr. Fowler recommend as a substitute for the enforcement of the Fairness Doctrine? He indulges in a vague and fatherly admonition to editors (newspaper or broadcast) suggesting that they be good fellows and not abuse their power. The press—(and he keeps referring to the "press" with a bland disregard of the uniqueness of broadcasting)—has received special protection under our Constitution. The "press", he declaims pontifically, must be "free to report" and, therefore *we* (presumably, the American public) must "take the risk of abuse". However, he offers no sound reason why the American public should be subject to the arbitrary power of those who monopolize the airwaves. His recommendation amounts to subjecting the public to the tender mercies of the broadcast industry. This, in turn, amounts to a reckless disregard of the public interest, and flies in the face of notorious abuse of their privilege by the major networks. All this is defended on the ground of his libertarian ideology—an extreme version of conservatism. The complex problems of public responsibility of broadcasters in an era of mass communication will not be resolved by the reiteration of stereotyped cliches like the "the less government, the better".

Coming now to his specific critique of the Fairness Doctrine in terms of "content regulations". For many years network executives and their public relations hirelings have engaged in propaganda to the effect that the Fairness Doctrine interferes with the discretion of broadcasters and allows the government to dictate the content of news and documentaries. This propaganda usually winds up on an ominous note warning of the "chilling" effect the Fairness requirement will have on their freedom to pursue the "investigative" reporting now considered indispensable to contemporary journalism.

A few statistics will shed some light on the alleged danger of government interference with the day to day discretion of broadcasters. This portrait of Big Brother looking over the shoulders of the licensee is almost ludicrous in light of the fact that out of 2,000 complaints filed for fiscal 1971 only 5 complaints were sustained. Furthermore, the so-called Phelps doctrine is virtually an insurmountable barrier to any individual complainant. The burden set by the Commission of proving that the licensee has failed in its overall programming to present a reasonable opportunity for contrasting views on a controversial issue, provides virtual immunity to the broadcaster from any challenge unless the complainant is wealthy enough to monitor the licensee for a substantial period. The FCC has held that the station need not supply any information to the complainant with respect to his Phelps burden. In short, the Commission has virtually emasculated the Fairness Doctrine. Between the lack of will on the part of the Commission to enforce the doctrine, and the utter distaste (to put it mildly) for that doctrine on the part of the Circuit Court of Appeals for the District of Columbia, we are examing what is almost a dead letter. I suggest that the FCC be called upon to explain to this Committee its solicitude for the care and feeding of the networks to the point where it has virtually obliterated the rights of a complainant. In the last analysis, the American public pays for the

[6] Id. at 329.

product of the networks, and is entitled to as much protection as consumers of other products.

As to the charge of government interference with "journalistic judgment", I defy the broadcasters to offer any concrete evidence to support that allegation. Indeed, the industry, in arguments before the Supreme Court in the BEM case strongly relied on fairness as the main reason for rejecting the claim that there was any right of access by individuals or groups to the broadcast media. After all, what does the phrase "journalistic judgment" mean—selection of issues to be presented, how to present them, the format, time, place and individuals selected to present the issue? It is manifestly absurd to argue that the broadcaster's judgment has to be first checked out with the FCC, if the word "judgment" be defined in those terms. The only requirement of the Fairness Doctrine is that at some time the opposing side be given the opportunity to appear. The licensee assumes the responsibility of presenting different views on controversial issues rather than turning its back on the public after getting across the view favored.

In conclusion, it appears that Mr. Fowler is undermining the only protection available to the public against the vast monopoly of the major networks. His plea to the broadcasters to exercise responsibility is commendable, but alas, it constitutes vain rhetoric without vigorous enforcement of the Fairness Doctrine by the FCC.

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[From Accuracy in Media, Inc., Oct. 1, 1981]

## THE FCC AGAINST FAIRNESS

The Federal Communications Commission under the leadership of Mark Fowler, an appointee of President Reagan, has voted to eliminate the requirements that broadcasters give equal time to political candidates and air all sides of controversial issues of public importance. These are the provisions of what is known as the fairness doctrine, which has been a thorn in the side of big media since 1973. That was the year the FCC upheld an AIM complaint against NBC, which had aired a very one-sided documentary criticizing private pension plans. NBC had arrogantly told the FCC that it had broadcast nothing on the other side and did not intend to do so. As a result, the FCC for the first time in history ruled that a network was in violation of the fairness doctrine and that it would have to tell the other side of the story.

As soon as NBC recovered from the shock, they went to court and succeeded in fighting the FCC to a draw. However, the case focused attention on the fact that the fairness doctrine could be employed to require the big liberal media to be fair. The American Security Council shortly thereafter filed a fairness complaint against CBS, charging that their reporting on national defense issues in the years 1972 and 1973 had consistently ignored or downplayed the views of those who were arguing that the United States was permitting its defenses to deteriorate dangerously. The complaint was the most massively documented fairness doctrine complaint in history, but the FCC brushed it aside.

Accuracy in Media became less active in filing fairness doctrine complaints after the FCC failed to vigouously pursue the case against NBC in the courts We detected a lack of courage on the part of the FCC when it came to tackling complaints against the networks. This was confirmed by the cavalier dismissal of the American Security Council complaint against CBS. We saw it again in 1980, when the Commission refected a complaint AIM filed against NBC's use of presidential candidate John Anderson as a daily commentator during the week of the Republican National Convention. That blatant action shocked both CBS and ABC, which apparently felt that this was not in accord with the spirit of the equal time requirements even if the FCC did not.

AIM has charged that the FCC has tended to use the fairness doctrine mainly against small stations that lacked the resources to fight back. We have questioned whether there was any point in keeping it if the FCC refused to enforce it against the persistent violations by the major networks and the Public Broadcasting Service. We had hopes that the new team at the FCC would recognize that they had an important tool at their disposal that could be used to achieve genuine balance in the news and public affairs programming of the media giants. Little did we realize that one of the first actions of the new team would be to give CBS, NBC and the Public Broadcasting Service just what they wanted—the total abolition of the fairness doctrine. Fortunately, this is not a decision that can be made by the FCC alone. They cannot repeal the law. Congress has to do that. But their recommendation will give

a powerful assist to the forces in Congress, led by Senator William Proxmire, working to strike the fairness and equal time provisions from the books.

A 1984 SCENARIO

The irony is that the conservatives who dominate the FCC are giving the liberals who dominate the big electronic media just what they want. They seem to be doing this because they are ideological purists. They have totally embraced the views of Justices Hugo Black and William O. Douglas with respect to the meaning of the First Amendment. Chairman Mark Fowler said in an article in the The Washington Post on September 20, 1981, that the FCC is asking Congress to "extend the full right of the First Amendment to the electronic press; the identical rights, in fact, that now obtain to newspapers, magazines, books, motion pictures and every other mode of expression." He notes that some critics have labeled the action "radical" and "revolutionary." To see just how radical and revolutionary Mr. Fowler's goal is, let's consider what 1984 may be like if his proposal is accepted by Congress.

Within a few blocks of the White House there are several theaters showing triple-X rated movies. That is a new-found First Amendment right under the Black-Douglas interpretation of the Constitution. Mr. Fowler would apparently extend the identical right to television. Your kiddies may be watching "Deep Throat" instead of "Captain Kangaroo" in 1984.

Let's say that Ronald Reagan decides not to run for a second term. The Democrats put up Ted Kennedy and the Republicans decide to go with Jack Kemp, even though his name recognition is relatively low. Kemp will need a lot of TV exposure to compete with the well-known Kennedy. The polls show him slightly behind in the last week of the campaign. He approaches the networks to buy time for a big blitz in the closing days of the contest. The networks like Ted Kennedy. He's running ahead and will probably be the next president. They tell Mr. Kemp that they are very sorry, but they just can't free up the time for his speeches and spots. Senator Kennedy is taking up so much time that it would be an excessive burden for them to provide him with anything like an equivalent amount of time. Kemp loses the election, and President Kennedy is appropriately grateful to the networks for their last minute assist.

That would be impossible under the law that Mr. Fowler wants to eliminate, but if he has his way, it could happen in 1984, not only in the presidential race, but also in senatorial, congressional and gubernatorial races throughout the country.

The CHAIRMAN. Mr. James L. Winston, the executive director and general counsel of the National Association of Black Owned Broadcasters.

Welcome. It is good to have you with us and we appreciate your patience. Go right ahead.

## STATEMENT OF JAMES L. WINSTON, EXECUTIVE DIRECTOR, NATIONAL ASSOCIATION OF BLACK OWNED BROADCASTERS

Mr. WINSTON. Mr. Chairman and Senators, thank you very much for this opportunity to present testimony before the committee. The National Association of Black Owned Broadcasters [NABOB] recognizes that the opportunity to provide oral testimony during the confirmation process is not routinely granted and we appreciate this opportunity.

Founded in September 1977, NABOB grew in response to demands from black station owners for representation and information regarding financial, legal and political issues facing them in the industry. NABOB is the first and only trade association organized to foster ownership of broadcast facilities by blacks. Today there are 118 black-owned, commercial radio stations and 11 commercial television stations. NABOB's active membership over 75 percent of all black station owners who themselves reach over 90 percent of all black Americans.

Black broadcasters have benefited from the Commission's tax certificate, distress sale and application comparative preference

policies. Many of our members are successfully operating stations directly as a result of these policies. However, the growth of black station ownership has slowed significantly in 1982, in part due to the overall economic climate in the country. It therefore is very important that the Federal Government continue to make every effort to foster and encourage equal employment opportunities and minority ownership in the telecommunications industry.

Indeed, Commissioner Anne Jones stated to our membership on September 17 at our recent national conference that, although she was very much opposed to an activist role on the part of the FCC in EEO-related matters when she arrived 3½ years ago, she now strongly believes that it is incumbent upon all Federal agencies to do everything they can to further equal employment opportunities. This substantial turnaround of viewpoint on the part of Commissioner Jones, after 3½ years of working closely with the problems of minorities and women in the telecommunication industry, lends strong support to our position.

Similarly, Commissioner Henry Rivera has expressed his strong support for EEO and minority enterprise. Commissioner Rivera chaired the Advisory Committee on Alternative Financing for Minority Opportunities in Telecommunications. The report of the committee adopted a number of proposals advocated by NABOB. It is expected that some of these proposals will be adopted by the Commission.

Yet, in spite of the support of Commissioners Jones and Rivera, and that of other Commissioners, we find today that equal employment opportunity and minority enterprise are suffering greatly at the Commission. The Minority Enterprise Division, which was created with a broad agencywide role of identifying areas in the Commission where minority enterprise could be aided, has been eliminated as a separate office.

First it was moved within the Office of Public Affairs. Subsequently it was eliminated and replaced with a single individual responsible for the minority enterprise function. In fact, although NABOB has been advised by the FCC that the Division was not abolished but only reorganized, it cannot be found listed anywhere in the functional listing of the Federal Communications Commission's phone directory.

Elsewhere in the Commission internal EEO is faring no better. There are no black Bureau Chiefs or Deputy Bureau Chiefs and only one black Division Chief in the Broadcast Bureau. Morale among black senior level staff personnel is very low. We have been advised by numerous FCC staffers that blacks are not being promoted in any significant numbers and are not being given a proportional share of merit increases for middle managers.

With respect to policy determinations, there has been no movement on a wide range of pending matters. BC Docket 80-90, the FM drop-in proceeding, which was designed to increase opportunities for minorities to obtain new FM radio stations, has been subjected to endless delay. This proceeding was initiated in February 1980 and the comment period ended in March 1981. Yet the Commission just reopened the proceeding for further comments.

The opening of AM clear channel frequencies was also intended to provide new opportunities for minorities. Yet, pending applica-

tions for stations on the clear channel frequencies have been delayed for over a year and a half in some instances. In addition, the Commission has placed a freeze on accepting new applications for the AM clear channel frequencies.

The low-power television licensing process moves forward only at a snail's pace. The three-tiered processing plan adopted by the Commission will virtually assure that there will be no substantial, new, low-power television service within the next several years in the large urban areas where minorities tend to reside.

The deregulation of radio has by default virtually eliminated the distress sale policy. Because station owners have very few FCC requirements with which they must now comply, very few licenses are being designated for revocation hearings. Therefore, licensees have no need elect distress sale treatment. The net result is that in 1982 there have been no distress sales. Prior to 1982 there had been 27 distress sales since the policy was adopted in May 1978.

The exact causes of all of the above-described circumstances at the FCC are not all readily apparent. However, it is clear that the Chairman of the Commission is the person who sets the pattern for the agency. Chairman Mark Fowler has on numerous occasions expressed views which have been opposed to historic policies which have aided minority ownership and EEO. The Chairman opposed any minority preference in the recently passed lottery legislation. Earlier the Chairman supported elimination of the Form 395 Annual Employment Report which measures EEO compliance.

The Chairman has also expressed his interest in abolishing the multiple ownership rules and in ending "localism" as a matter of concern to the Commission in the awarding of new licenses for broadcasting facilities. Although not directly antagonistic to minority interests in themselves, these two policies will have their greatest negative impact on minorities because they favor the larger business entities.

Moreover, even in the Commission's most recent positive action on behalf of minority ownership, an FM comparative hearing in which the Commission awarded a new FM license in Hart, Mich. to a black applicant, the Chairman cast the lone dissenting vote against that decision. Taken together these circumstances strongly suggest that the present Chairman is not inclined to take action in support of minority ownership and EEO.

The nominee for the seat of Commissioner now before the committee, Stephen Sharp, was appointed to his present position as General Counsel by the Chairman. The Chairman has also been one of his strongest supporters for the position of Commissioner.

NABOB is concerned that Mr. Sharp's views on minority ownership and EEO, which have not been placed on the public record, may be similar to those of the present Chairman. NABOB therefore requests that the committee question Mr. Sharp with respect to his views on those matters.

Attached to this statement are a number of questions which NABOB requests that the committee direct to Mr. Sharp.

I thank you again for providing NABOB with this opportunity to present its views.

The CHAIRMAN. Mr. Winston, can I get those questions right away because I will get them down to Mr. Sharp and get answers

from him this afternoon because it is likely this Congress, if we are going to act at all on this nomination, is going to act in the next 10 days and I would like to have the answers to those questions before we act.

Mr. WINSTON. All right, fine. The questions are attached to my statement and I will get copies to you.

The CHAIRMAN. As soon as you leave if you will go to one of the committee clerks and get a Xerox of those questions, I will get them to Mr. Sharp this morning and get some answers.[1]

Mr. WINSTON. I believe the committee clerk probably already has copies of the questions. I should indicate the questions were forwarded to Mr. Sharp back in May. So he has had an opportunity to review them.

The CHAIRMAN. He hasn't got them in by now and he has had them since May?

Mr. WINSTON. That is right.

The CHAIRMAN. The same questions?

Mr. WINSTON. Yes.

The CHAIRMAN. Chris, will you make sure we have answers to those this afternoon?

Mr. COURSEN. Yes, sir.

The CHAIRMAN. I don't have any questions. I think the issues you raised are valid and I think your observations are perceptive. I appreciate you coming.

Mr. WINSTON. Thank you.

The CHAIRMAN. Thank you.

Next Mr. Pluria W. Marshall, the chairman of the National Black Media Coalition.

Good morning, Mr. Marshall.

## STATEMENT OF PLURIA W. MARSHALL, CHAIRMAN, NATIONAL BLACK MEDIA COALITION

Mr. MARSHALL. Good morning, Senator.

I am Pluria Marshall, chairman of the National Black Media Coalition. I want to thank you for giving us this opportunity to appear before you.

I would like that our statement be entered into the record and I won't take the time to go over many of the same issues that have already been presented here in some form or another this morning.

The one area that we are particularly concerned about goes to the issue of parity. I think that it is very important to us to know where this proposed nominee to the FCC stands on parity because as we look at parity in broadcasting and cable broadcasters are in compliance with parity rules if they have reached one half of parity.

It kind of takes me back in history where at one point black Americans were only three-fifths of a person and today at the FCC we only have to be one half of a person to be impliance with the FCC rules and in cable 25 percent of a person. I think it is disgusting that in 1982 we have these racist rules that are being enforced

[1] See p. 40.

and put out in the marketplace as the norm for the broadcasters in cablecasters to follow.

I am very concerned that parity at the FCC and in the broadcast industry and in the cable industry does in fact become actual parity instead of one half or one fourth of parity. We would be very interested to know where this new nominee stands on the issue of parity.

I think this is a travesty of justice and we have allowed it to go on long enough and I think it needs to be dealt with forthright. It was very encouraging to see Commissioner Anne Jones realize 3½ years later that equal employment opportunity rules do in fact need to have more shoulders to it and it should be at the FCC.

So, Mr. Chairman, I come before you this morning to really deal that one area of parity and I hope that we can get a direct answer on this proposed nominee to the Commission on where he stands and I would ask that the committee walk with this issue in the future more closely.

The CHAIRMAN. Mr. Marshall, I agree with you. In the past I thought both you and Mr. Winston have been very fair. You are not coming in and asking for quotas and you are not asking for people to be promoted regardless of ability. You are asking for a fair shake.

Mr. MARSHALL. That is right.

The CHAIRMAN. I think in many areas, and it is not limited to the FCC, but in many areas you do not get it. It is more than a travesty. It is a tragedy. In the long run it does not serve you, me, nor this country well to receive the treatment that on occasion you have unjustifiably received.

I don't have any questions. I appreciate you coming.

Mr. MARSHALL. Let me just say one other thing. The Office of Management and Budget has given an edict that the rules be abolished and the deadline for this is sometime in January. I hope that this body will make sure that the issues are aired openly and fairly and the buck isn't passed because if in January the Commission attempts to do what OMB has told them to do, I shudder at the thought of where we would be as black Americans if those rules are thrown out altogether.

Thank you very much.

The CHAIRMAN. Thank you very much.

[The statement follows:]

STATEMENT OF PLURIA W., MARSHALL, CHAIRMAN, NATIONAL BLACK MEDIA COALITION

Good Morning Senator Packwood, my name is Pluria Marshall, and I am speaking on behalf of the National Black Media Coalition. The Coalition, thanks the Subcommittee for the opportunity to be heard concerning the confirmation of Mr. Sharp.

The hearings which you conduct today happen at a crucial juncture in the telecommunications public policy. Dramatic developments are occuring within the Commission and the industries it regulates or, seeks to un-regulate. The Commission is being reorganized to reflect the changing shape and organization of a telecommunications video industry alleged to be on the brink of technological abundance. This abundance has the potential to facilitate the diversity of viewpoints which the First Amendment requires.

Some persons within the telecommunications community allege that this new diversity has arrived and, consequently prior regulatory policies based upon the tenet

of scarcity are no longer relevant. Thus Commission policies regarding EEO and minority ownership are criticized as no longer being necessary. NBMC does not agree. The telecommunications industry is in the early stages of a transition from monopoly and/or scarcity to what we hope is a competitive environment. Under current market conditions, deregulation does not assure increased competition and could result in the further development of monopolies with no regulation by government. The allegations that the scarcity reationale does not apply are premature.

Today NBMC seeks to determine the position of Mr. Sharp on the policies of industry EEO, minority ownership, and EEO at the Commission. Specifically, what policy commitments is Mr. Sharp willing to make concerning parity in employment and ownership for minorities in telecommunications?

### 1. INDUSTRY EEO

By now it should be clear that equal employment regulations in the video industry are crucial to the creation of diversity of programming content without direct government involvement in content regulation. The major problem is that the Commission still has not required that broad and cable casters hire and retain minorities and women in percentages commensurate with their percentage in the area of license. The presence of representative numbers of minorities and women in key positions within the video industry would assure a greater sensitivity on the part of majority-owned video-casters, and would create the opportunities for future minority and female entrepreneurs to get the experience needed to render their bids for ownership bankable.

Despite the importance and success of the Commission's EEO policy which has withstood substantial judicial and regulatory scrutiny, there are those who would eliminate it. NBMC wishes to have the policy expanded to require parity. That is, minorities and women should be employed in the video industry in the same proportions as they are represented in the workforce. NBMC wants to know whether Mr. Sharp will support the retention and expansion of this policy in the event that he is confirmed as a Commissioner.

### 2. MINORITY OWNERSHIP

Recent administrative law decisions as well as proposed changes in the multiple and cross ownership policies have the potential to seriously undermine minority efforts to enter the new telecommunications markets. The loss of diversity preferences and ownership concentration restrictions at a time when minorities are seriously under-represented, and when the industry is undergoing immense technological growth, increasing ownership concentration and high capital costs would result in minority entrepreneurs being frozen out of the video market place.

NBMC wishes to know whether Mr. Sharp will vigorously work to insure that minority ownership does not become a victim of myopic, misguided efforts to increase diversity. NBMC also seeks assurances and commitments that Mr. Sharp will support minority efforts to achieve parity of ownership in telecommunications.

President Reagon has stated that " (a)s the minority business sector secures its position in the American marketplace, not only minority Americans but all of our citizens will benefit". NBMC invites Mr. Sharp to assist the President by supporting and enforcing the EEO and ownership initiatives that will ultimately assure minority economic independence and self sufficiency.

### 3. EEO AT THE COMMISSION

Finally, the virtual absence of blacks in policy positions within the Commission's bureaus and divisions is a disgrace. Aside from recent legal articulations of concern, there are indications that those blacks who are at the Commission are not receiving access to the various bureaus and divisions in which new technology regulation will occur. Should Mr. Sharp be confirmed as a Commissioner, what efforts will he make to rectify the present absence of minorities in key positions at the Commisssion?

NBMC wishes to emphasize its desire that Mr. Sharp respond to the Subcommittee regarding the questions raised today. Moreover, NBMC seeks a commitment from Mr. Sharp that he will in fact seek to preserve and extend the hard fought gains of minorities regarding EEO and minority ownership; as well as work to make the Commission representative of the citizens it is supposed to serve.

Thank you Mr. Chairman.

The CHAIRMAN. We will conclude today with Mr. Al Hammond of the Communications Task Force, National Conference of Black Lawyers, Landover Hills, Md.

Good morning, Mr. Hammond.

**STATEMENT OF AL HAMMOND, COMMUNICATIONS TASK FORCE, NATIONAL CONFERENCE OF BLACK LAWYERS**

Mr. HAMMOND. Good morning, Senator.

I will request that my printed remarks be placed in the record and will just talk briefly from some points that I have made.

The CHAIRMAN. Your entire statement will be in the record.

Mr. HAMMOND. Thank you.

First of all, NCBL recognizes that the industry is in a state of dynamic change. We are poised on the brink of what we will hope will be a technological abundance of outlets. This abundance could in fact result in a diversity of viewpoints being presented.

Our concern, however, is that the diversity that we are looking for is not presently here. The potential for competition does not equal a reality of competition. Until we receive that reality we are quite concerned about some of the policy changes that are being proposed at the Commission. What we see is a telecommunications industry in the early stages of transition from monopoly or scarcity, if you will, to a competitive environment.

We believe that the deregulation that many people are proposing could result in decreased competition, given the accelerated merger and acquisition activity that we presently see in the industry, the high cost of capital, which in many cases will preclude entry by small and minority firms and the proposed elimination of ownership rules.

What we would like to know is where the nominee, Mr. Sharp, stands on these items and beyond these items, where he also stands on EEO, which I think Mr. Marshall and Mr. Winston both spoke to earlier, minority ownership, the Fairness Doctrine, which I think Accuracy In Media alluded to earlier this morning, section 315, and, of great importance to us, EEO at the Commission.

I think Mr. Marshall, and in more detail Mr. Winston, detailed the concerns which we share with the National Association of Black Owned Broadcasters with regard to the current plight of minorities at the Commission, or I should say absence of minorities at the Commission.

We believe that industry EEO facilitates content diversity without requiring that the Commission get directly involved in content regulation. It facilitates structural diversity as well because it is as a result of individuals employed in the video industries that we have the requisite expertise to then become owners in the industry.

One of the things that any bank will look at in deciding whether or not to make a loan is the track record of the individual and their expertise in the area that they are attempting to go into. We believe therefore that the EEO rules are extremely important and we become quite concerned about the upcoming review of form 395 in January.

As far as minority ownership is concerned, at this time preferences and concentration restrictions still appear to be necessary to

us. There are very few minority owners in the telecommunications industry. We are presently offset in terms of our efforts by the high dollar costs of entry, by current merger and acquisition trends, which I believe will have an adverse impact, and by the current actions at the FCC, which Mr. Winston detailed.

The importance of minority ownership I don't think can to be emphasized too greatly, but briefly it will increase and has I think increased the diversity which we presently have in this society and the quality of the product that is being produced and provided not just to minorities but also to the majority public. It will in fact be one of the methods by which minorities come to their own economic self-sufficiency and if minority ownership and minority firms are typical of their majority owned small business counterparts, it will increase the number of jobs made available, the amount of innovation that the country receives and will have a positive impact on the economy.

I will not go into too much detail on our concerns with regard to fairness. I do believe that in time, with the increase in the number of outlets becoming a reality, that the fairness doctrine should be revisited, and I think that is a very appropriate item for the Congress at that time to review. I don't think that the plethora of outlets is presently there.

As far as the EEO at the Commission, I think I would rely on the remarks made by Mr. Winston. I think they are more than accurate.

What I would also like to do for the record is have a number of other materials which have been produced by members of NCBL in the past—which go specifically to the issues which have been addressed this morning—submitted for the record. I would appreciate it.

The CHAIRMAN. They will be included in the record by reference.

I think everything that Mr. Winston, Mr. Marshall, and you have said doesn't have to be prefaced with "I think." All you have to do is look at the figures and look at the actions and in this case facts speak louder than words.

Thank you very much. I appreciate your taking the time to come and waiting while we went through the other witnesses.

Mr. HAMMOND. Thank you, Senator.

The CHAIRMAN. I have no questions.

[The Statement follows:]

STATEMENT OF AL HAMMOND, CABLE COMMITTEE, COMMUNICATIONS TASK FORCE OF THE NATIONAL CONFERENCE OF BLACK LAWYERS

Good Morning Senator Packwood, my name is Al Hammond, and I am speaking on behalf of the National Conference of Black Lawyers' Communications Task Force. The Task Force, which is composed of minority members of the communications bar, thanks the subcommittee for the opportunity to be heard concerning the confirmation of Mr. Sharp.

The hearings which you conduct today occur amidst the backdrop of dramatic developments within the Commission and the industries it regulates or, seeks to unregulate. The proposed reorganization of the Commission seeks to reflect the changing shape and complexion of a telecommunications video industry poised on the brink of technological abundance. And abundance which has the potential to facilitate the diversity of viewpoints mandated by the First Amendment.

There are those within the telecommunications community who allege that this new diversity is a fait accompli and, consequently prior regulatory policies based

upon the tenet of scarcity ought no longer apply. Thus Commission policies regarding EEO, minority ownership, fairness and political access are criticized as no longer being necessary. NCBL does not agree. At best, the video industry is in the early stages of transition from monopoly and/or scarcity to a competitive environment. Under present market conditions, deregulation does not assure increased competition and in some instances could result in the re-emergence of monopolies unchecked by government regulation. Hence the reports of the scarcity rationale's demise are premature.

Having briefly stated its view, the Task Force today seeks to ascertain the position of Mr. Sharp on the policies of industry EEO, minority ownership, Fairness, 315, and last but not least, EEO at the commission.

1. INDUSTRY EEO

The retention and expansion of equal employment regulations in the video industry is crucial to the continued facilitation of diversity of programming content without direct government involvement in content regulation. The presence of representative numbers of minorities and women in key positions within the video industry assures a greater sensitivity on the part of majority-owned video-casters, and creates the necessary opportunities for future minority and female entrepreneurs to garner the experience needed to render their bids for ownership viable.

Despite the importance and success of the Commission's EEO policy which has withstood substantial judicial and regulatory scrutiny, there are those who would eliminate it. NCBL wishes to know whether Mr. Sharp will support the retention and expansion of this policy in the event that he is confirmed as a Commissioner.

2. MINORITY OWNERSHIP

Recent administrative law decisions as well as proposed changes in long established multiple and cross ownership policies have the potential to seriously deflate minority and small business effort to enter the video markets. The loss of diversity preferences and ownership concentration restrictions at a time when minorities are woefully under-represented in a video industry undergoing immense technological growth, increasing ownership concentration and high capital costs would inevitably result in minority entrepreneurs being frozen out of the video market place.

NCBL wishes to know whether Mr. Sharp will vigorously push to assure that minority ownership does not become a casualty of short sighted and ill conceived attempts to facilitate diversity. Specifically, what would he do to avoid such an occurrence?

President Reagan has stated that "(a)s the minority business sector secures its position in the American marketplace, not only minority Americans but all of our citizens will benefit" . . . what our administration and our party seek is the day when the tragic side of the black legacy in America can be laid to rest once and for all, and the long, perilous voyage toward freedom, dignity and opportunity can be completed."

The Task Force applauds the President's goals and invites Mr. Sharp to assist the President by supporting and enforcing the key policy initiatives that ultimately assure minority economic independence and self-sufficiency.

3. FAIRNESS AND 315

The importance and necessity of the fairness doctrine and 315 will not diminish if at all until such time as the promised technological diversity has occurred. While the American public awaits the long heralded diversity, nothing should be done to undermine or eliminate the limited access which the citizenry now has to balanced presentations of controversial issues of public importance and to its elected officials. NCBL wishes to know where Mr. Sharp stands with regard to these two policies. Will he support efforts to retain them should he be confirmed? If not, why not?

4. Finally, there is growing concern over the virtual absence of blacks, in policy positions within the Commission's bureaus and divisions. Aside from recent public airings of concern, there are indications that those blacks who are at the Commission are not adequately distributed among the various bureaus and divisions. Should Mr. Sharp be confirmed as a Commissioner, what efforts will he make to rectify the present absence of minorities in key policy positions at the Commission?

In closing these brief remarks, NCBL wishes to emphasize its concern that Mr. Sharp be allowed to respond to the Subcommittee regarding the queries raised here today.

Moreover, NCBL seeks a commitment from Mr. Sharp that he will in fact seek to preserve the hard fought gains of minorities and the public vis-a-vis EEO, minority ownership, Fairness and 315, as well as work to make the Commission representative of the citizens it seeks to serve.

With the subcommittee's indulgence, I would like to submit supporting documents for the record.

Thank you Mr. Chairman.

This will conclude the hearing on Mr. Sharp's nomination.

[Whereupon, at 10:37 a.m., the hearing concluded.]

[The following information was subsequently received for the record:]

QUESTIONS OF THE COMMITTEE AND THE ANSWERS OF MR. SHARP

*Question 1.* On April 1, 1982, the Commission refused to preempt state regulators from imposing accounting and depreciation rules for inside wiring which were inconsistent with those already issued by the Commission. As a result of the Commission's failure to act in this areas, many states are refusing to allow carriers to implement new depreciation methods which are consistent with the Commission's original order. Does the Commission still believe that the state regulators should be allowed to ignore the Commission's decisions on depreciation?

Answer. I must respectfully refrain from commenting upon this question because it addresses a matter in which petitions for reconsideration are pending. It would be inappropriate for me as General Counsel or as a Commissioner to give any indication of the possible outcome of that proceeding.

*Question 2.* As a result of the modified Consent Decree settling the case of *U.S.* v. *AT&T* do you see any changes that need to be made in the Commission's Computer II decision? Is the Commission considering a more accelerated or immediate deregulation of the embedded terminal equipment?

Answer. The Commission has not yet fixed a date for removal of embedded terminal equipment from carrier rate base. We are aware of the need to coordinate our action in this regard with other events, such as the divestiture of the BOC's ordered in *U.S.* v. *AT&T*. The staff of the Common Carrier Bureau is focusing on this question.

*Question 3.* On reconsideration in Computer Inquiry II, the Commission relinquished to state regulators further authority over structural requirements such as separate subsidiaries on exchange carriers providing enhanced services and CPE. Will the Commission re-address this issue or continue to let state regulators address it on an ad hoc basis? In order to have consistent national policy and to implement deregulatory decisions, does the FCC have to preempt the states in certain areas?

Answer. The Commission has always maintained that states may not impose regulations which would undermine national policy. I fully agree with that position. I must respectfully refrain from further comment on this matter because there is a petition for reconsideration of this point pending. It would be inappropriate for me as General Counsel or as a Commissioner to comment at this time.

*Question 4.* Under the Decree, the Bell Operating Companies are allowed to engage only in intrastate activities. Do you believe that the BOC's are still subject to Computer II?

Answer. To the extent that the *Computer II* rules apply to all carriers (e.g. in detariffing terminal equipment) they are clearly applicable to the BOC's, even though the BOC's will be limited to exchange activities. It is not entirely clear whether the kind of structural separations imposed on AT&T in *Computer II* should be applied to the divested BOC's however. They will be able to offer terminal equipment for sale, and therefore would have some of the blending of regulated and unregulated activities which prompted the separation requirement. The need for separation for the BOC's is a question which the Commission can address either in its ongoing implementation proceeding or upon specific request.

*Question 5.* As a result of the modified Decree, should Congress require the FCC to preempt state regulation of terminal equipment and intrastate toll, as was provided for in S. 898?

Answer. The *Computer II* decision preempted state regulation of terminal equipment. Legislation to do so would be needed only in the event that the U.S. Court of Appeals for the D.C. Circuit fails to affirm the *Computer II* decision. There are advantages to vesting regulatory authority over all interexchange service in the FCC. I would encourage and support legislative action to accomplish this.

*Question 6.* In the Commission's decision in Computer Inquiry II it is important for the industry to have a clear understanding of the distinctions between basic and enhanced services, so that the regulatory status of possible investment decisions can be understood, independent of having to go to the Commission for clarification. The Common Carrier Bureau initially recommended to the Commission that the BPSS tariff be rejected on Computer II grounds. Although this recommendation was later changed under pressure from several commissioners, the BPSS order still contains language which some believe may confuse the critical distinction between basic and enhanced services. Please comment on your view of the importance of the basic and enhanced distinction. If there has been a blurring of this distinction, what action should the FCC take to clarify the matter?

Answer. The Computer II decision established an important and desirable line between offerings which are regulated, "basic," and offerings which are beyond regulation, "enhanced." This line provides a realistic basis for determining regulatory treatment of a particular service and, as such, provides needed guidance for the telecommunications industry and its users.

I must respectfully refrain from any further comment on this question because it addresses a matter in which a petition for reconsideration is pending. It would be inappropriate for me as General Counsel or as a Commissioner to prejudge that decision.

*Question 7.* In the Commission's order which rejects the Bell Packet Switching Service tariff, the Commission stated that there are several "distinguishing characteristics" between the BPSS switch and other switching devices such as digital time division switches. However, the Commission gave no description or explanation of what these distinguishing characteristics are. Please explain what these distinguishing characteristics are. Futher, please explain the policy relevance of making such a distinction.

Answer. This question refers to the FCC's recent decision to reject an AT&T tariff filing because the company had failed to obtain a section 214 certificate of public convenience and necessity before seeking to tariff its BPSS service. The Commission concluded that 214 authority was necessary in this case because the service involved the use of equipment that performed mutiplexing functions for which 214 authority is required. The Commission emphasized that its decision regarding the need for 214 authority was a very limited one. It applied only to BPSS equipment. It did not extend to other equipment which might be "like" BPSS equipment in that it performed both multiplexing and switching functions, but unlike BPSS equipment in other ways. For example, it might not have the same technical characteristics or the same principal function. The Commission reserved those questions for another day and another record where it could explore all the ramifications of that decision. It would be inappropriate for me to speculate on what the agency might do if and when that broader issue is presented.

*Question 8.* The Commission set up a Federal-State Joint Board on June 11, 1980 to make urgently needed revisions to the existing separations and settlements process that were believed to be necessary in a competitive environment. When will the Joint Board make a decision on these issues?

Answer. The Joint Board expects to make a recommended decision in this matter in March, 1983.

*Question 9.* Recent proposals by the Common Carrier Bureau, if carried out, indicate that there would be little change in the current allocations between interstate and intrastate jurisdictions. How will these proposals put existing carriers in a more competitive position?

Answer. This question refers to a Bureau proposal which is under consideration in our docket 78-72 proceeding. As General Counsel or as Commissioner, it would be inappropriate for me to comment upon the merits of the Bureau proposal at this time. I plan to study comments on the proposal to learn its advantages and disadvantages.

*Question 10.* Is consideration being given to the adoption of some kind of high-cost factor to provide support for rural and remote areas in order to avoid the disruption of service that would take place if these areas are faced with large increases in rates as a result of FCC action?

Answer. Yes. The Joint Board has endorsed this concept unanimously.

*Question 11.* Do you support action by the Commission to ensure that reasonable telephone rates are maintained in rural and remote areas?

Answer. Yes. In fact, the Communications Act directs to Commission to ensure, as far as possible, that all parts of this country have adequate service at reasonable rates.

QUESTIONS OF SENATOR STEVENS AND THE ANSWERS THERETO

*Question 1.* Would you agree, as stated in section 1 of the Communications Act of 1934, as amended, that Congress created the F.C.C. for the purpose of making "available, so far as possible to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communications service with adequate facilities at reasonable charges, . . . [and] for the purpose of promoting safety of life and property through the use of wire and radio communication, . . ."? (47 U.S.C. § 101, emphasis added).

Answer. Yes.

*Question 2.* Would you agree that the legislative mandate reflected in Section 1 of the Communications Act vests the F.C.C. with both the duty and the authority to take specific regulatory actions that are designed to make telecommunications services available, at reasonable charges, throughout the United States?

Answer. Section 1 of the Communications Act is a statement of purpose which defines the general direction or goals of regulation under the Act. The section itself confers no authority or duty except to "execute and enforce the provisions of this Act." Authority is conferred upon the Commission in sections 4(i) and 4(j) and subsequent sections dealing with specific issues. It is clear that one of the reasons for establishing the F.C.C. was to provide a body which would act to make telecommunications services available at reasonable charges.

*Question 3.* As I am sure you already know, the spread of Alaska's sparse population over vast and often physically inaccessible terrain makes an efficient and reasonably priced telecommunications system vital for many aspects of daily life in Alaska. The isolation of Alaska's rural areas, especially during the long and harsh winters, means that the "safety of life and property" often depends upon access to "wire and radio communication", more so than in any other state. Would you agree that Alaska's great need for access to an efficient and affordable telecommunications system, combined with Alaska's unique physical and demographic characteristics, requires the F.C.C. to take special precautions to insure that Alaskans are beneficiaries of the universal service mandate embodied in the Communications Act?

Answer. It is incumbent upon the FCC to be sure that it has considered fully any unique circumstances which exist when deciding questions of policy. There are problems unique to major urban centers such as Manhattan as well as those unique to rural and sparsely populated areas. The Commission has already taken steps to insure that Alaskans are beneficiaries of the mandate embodied in Section 1 of the Communications Act. In the Docket 21263 Rate Integration proceedings, the Commission required carriers providing service between the U.S. Mainland and Alaska to integrate rates for service between those points into the interstate Message Telecommunications Service (MTS) and Wide Area Telecommunications Service (WATS) rate structures. This action brings the benefit of distance-insensitive satellite technology to Alaska. In addition, the Commission is currently involved in two other proceedings which consider the specific circumstances presented by Alaska in deciding how the particular needs of that State will best be served under the Act. See CC Docket 80-584, "Domestic Satellite Earth Stations in Alaska," 81 FCC 2d 304 (1980) and CC Docket 78-72, Phase 2, "MTS and WATS Market Structure," 75 F.C.C. 2d 644 (1980).

*Question 4.* I am sure that you would agree that the FCC's mandate includes the promotion of an affordable, Nation-wide telephone system. As you may be aware, Alaska's citizens simply do not enjoy the same access to such a system as do their fellow citizens in the other 49 states. Not only does Alaska have the lowest telephone penetration rate of the 50 states, but approximately half of the rural population of Alaska receives no phone service at all, or has access to only single toll circuits or unreliable short-range radio telephones. I am concerned not only about this lack of universal telephone service in Alaska, but also with the cost of such service. Long distance rates, and local rates in the rural areas of Alaska, are very often higher than the national average. Any increases in these rates could halt the fragile progress that has beem made in trying to provide access to a Nation-wide phone system to Alaska's citizens, especially in rural areas. My concern was demonstrated by my support of S. 898, which passed the Senate by a 90 to 4 vote. As you may be aware, S. 898 contained a provision in § 202(e) that would require the FCC to adopt, whenever necessary, a mechanism, such as a surcharge on access charges, in order to prevent unreasonable charges for basic telephone service.

If you are confirmed by the Senate, would you keep in mind the large disparities between the telephone system that Alaska currently has, and the reasonably priced,

Nation-wide telephone system that the Communications Act mandates, during any proceedings before the FCC that could affect the telephone system in Alaska?

Answer. Yes.

*Question 5.* In particular, I am currently very concerned about the effect that the following three proceedings could have on Alaska's telephone system: the Fourth Supplemental Notice of Inquiry and Proposed Rulemaking in CC Docket No. 78–72; the Joint Board proceeding in CC Docket No. 80–286; and the implementation of the FCC's final decision in its second computer inquiry (Docket No. 20828). I would hope you will take a special interest in these proceedings with a view toward ensuring that Alaska's citizens are protected against unreasonable rate increases. Specifically, would you support a mechanism such as a surcharge on access charges to prevent Alaska's ratepayers from bearing an unreasonable burden in comparison with rates paid by consumers in the rest of the country?

Answer. I am mindful of the unique problems faced by Alaska in communications and the importance of communications service to all Alaskans. I will keep these circumstances in mind in any proceeding affecting Alaska. The Alaska ratepayer appears to be in the same situation faced by the ratepayers of many rural, high cost telephone companies. I have stated my belief that the FCC has the authority to require the nationwide pooling of access charges if this would promote the goal of the Communications Act. This mechanism is one way in which all rural, high cost telephone companies could be helped, and it seems that the particular concerns of the Alaska ratepayer can and should be considered in the same context. Some Alaska telephone companies have in fact raised this very point in the Commission's access charge preceeding. Since the matter of access charges is currently before the Commission in Docket 78–72, it would be inappropriate to comment further at this time.

The ultimate answer to the concerns of the rural telecommunications user, however, may be technological rather than regulatory: the new Digital Termination Systems (DTS) which the Commission has recently authorized have the potential for becoming a reliable means of telecommunications that is well suited to rural areas such as Alaska.

*Question 6.* I am sure that you would agree that the Communications Act's mandate includes communications services via satellite to Alaska and the rest of the United States. Alaska depends to a far greater degree than any other state upon domestic satellites for its day-to-day communications services. These satellites not only provide rural Alaska with much of its basic telephone service, but they also provide one of the few ways that Alaska can maintain simultaneous telecommunications links with the other 49 states.

As you may be aware, only satellites that orbit within the "prime orbital arc" (located between 119 degrees West longitude and 135 degrees West longitude) are capable of providing service to all 50 states at once. In the past, the FCC has allowed domestic satellites to occupy these scarce positions even though they were not equipped to provide telecommunications service to Alaska. My concern over this lack of Nationwide telecommunications service prompted me to introduce an amendment to S. 898, which was part of the bill when it passed the Senate. This amendment prohibits the FCC from licensing, authorizing, or permitting satellite facilities to be located within the prime oribtal arc "unless such facilities are used or are capable of being used to provide essentially the same services to all fifty States of the United States."

Even without such legislative direction, the FCC may achieve the same result by conditioning its approval of satellite launches, and by other means. As a matter of policy, would you support the imposition of a "nationwide service" capability requirement on all domestic satellite operations so that the benefits of satellite communications can be shared by all of the citizens of our nation?

Answer. You may be sure that I will be sensitive to the special concerns of the State of Alaska. However, as you know, there are tradeoffs involved in designing a satellite so that it will be capable of providing 50 state coverage. It may, for example, increase design and launch costs significantly and may shorten the useful life of the satellite. In authorizing domestic satellites, the Commission has recognized that these tradeoffs exist, but it has encouraged satellite operators to provide for 50 state coverage. For example, the Commission has asked for specific justification when a satellite does not provide 50 state coverage and has indicated that 50 state capability will be a factor to take into consideration when assigning orbital slots in the prime orbital arc. I support a continuation of these parctices which, I believe, strike a reasonable balance between the particular needs of the State of Alaska and the Commission's oft-stated desire to promote a competitive marketplace in the provision of domestic satellite communications.

## Questions of Senator Cannon and the Answers Thereto

In the Commission's current access charge proceeding, it is investigating the amounts to be paid by long distance carriers for access to the facilities of local telephone companies. I have several questions that relate to this proceeding:

*Question 1.* In your opinion, does the Commission have the authority to set an access charge rate structure for telephone companies that are not "fully subject" to FCC regulation? If so, from what part of the Communications Act is this derived?

Answer. Yes. Section 2(b) of the Communications Act specifically states that all carriers are subject to Sections 201–205. The FCC's authority to set an access charge rate structure derives from those sections.

*Question 2.* In your opinion, does the Commission have the authority to require nationwide pooling of access charges to help rural, high cost companies? If so, from what part of the Communications Act is this derived?

Answer. I believe the FCC would have authority to adopt a policy favoring nationwide pooling of access charges if it finds that this would promote the goals of the Communications Act. Sections 4(i) and (j) of the act give the agency broad authority to take actions that will further its objectives. If the Commission concludes that nationwide pooling of access charges will serve this purpose, I believe it correctly may find those charges "reasonable" within the meaning of section 201 of the act.

*Question 3.* In your opinion, who should be setting the charges for access—the companies, the FCC, the State commissions or a combination of each?

Answer. As written, the Communications Act shares this responsibility among the three. Carriers have a right to propose access charges and the regulators must determine whether those proposed charges are reasonable. The FCC's jurisdiction extends to interstate access charges, while the states have jurisdiction over interstate access charges.

I believe that it would be sensible to unify jurisdiction over interexchange access charges in the FCC, as proposed in S. 898, since telephone toll boundaries are unrelated to state boundaries.

*Question 4.* If candidate A requests time to buy a spot announcement—would candidate B be entitled to a like amount of time?

Answer. Yes.

*Question 5.* Would candidate A be entitled to pay the lowest unit rate for a spot announcement?

Answer. Yes, if the broadcast of a use occurs within 45 days of a primary, or 60 days of a general election.

*Question 6.* Would candidate B be entitled to also pay the lowest unit rate?

Answer. Yes.

*Question 7.* Would an independent group who opposed either A's or B's candidacy be entitled to purchase advertising time?

Answer. Not as a matter of right.

*Question 8.* Could an independent group be denied time by a radio or television station?

Answer. Yes, aside from federal candidates' rights under Section 312(a)(7), or equal opportnity rights under section 315, there exists no right of access to the media. See *CBS* v *DNC*, 412 U.S. 94 (1973).

*Question 9.* If a station sells time to an independent group which opposes a candidate is the candidate entitled to respond to that group?

Answer. Yes, but only through supporters, unless there is a "use" by the independent group. See *Carter-Mondale Reelection Committee*, 81 FCC 2d 409 (1980).

*Question 10.* Can supporters of the candidate opposed by the independent group ask for equal opportunities as the independent group?

Answer. Under the *Zapple* Doctrine, supporters are entitled to "quasi-equal" opportunities. See Carter-Mondale Reelection Committee, 81 FCC 2d 409 (1980).

*Question 11.* What if the supporters of a candidate cannot afford to respond to the independent group?

Answer. The Commission decided unanimously in 1980 that it would not become involved in the relative financial ability of political organizations during campaign periods, See Carter-Mondale Reelection Committee, 81 FCC 2d 409 (1980).

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## Questions of Senator Hollings and the Answers Thereto

On July 9, 1982, AT&T filed a $130 million rate increase for the facilities it leases to other Common Carriers for local distribution. These rates are scheduled to become effective January 9, 1983. They will double the rates now being paid for these facilities by OCCs. The rates being increased by this filing were "accepted" by

the Commission as part of a Settlement Agreement in Docket 20099. Since they were the product of a negotiated settlement, the FCC did not require that they be cost justified at that time. In the Docket 20099 Settlement, AT&T agreed that all rates for facilities leased to OCCS in the future would be cost justified according to the requirements of part 61 (Tariffs and Cost Support) of the Commission's Rules. The U.S. Court of Appeals for the D.C. Circuit has recently held this provision is binding upon both AT&T and the Commission.

*Question 1.* Since both the Settlement Agreement in Docket 20099 and the competitive effects os this more than doubling of OCC rates by AT&T seem to warrant particular secrutiny, and the rates themselves have never been cost justified, do you believe a particularly rigorous cost support standard should be employed in this case?

Answer. I believe that because of the potential impact of this increase the staff should examine the cost support materials with particular care.

*Question 2.* Since the wholesale rates charged OCCs are significantly higher in most cases than the MPL rates AT&T's own customers are charged, do you believe the filing violates the ban on unreasonable discriminations found in both the statute and the Commission's Order in the *Bell Systems Tariff Offerings* case?

Answer. While it would be inappropriate for me to make a statement on this matter since it is under active consideration by the Commission, such rate disparities, if they exist, would warrant close Commission scrutiny.

*Question 3.* In 1979, the Commission initiated Docket 79-246, the *Private Line Rate Structure (Docket 79-246)* case. In its opinion there, the Commission made certain findings concerning AT&T's private line tariffs in general and its OCC tariffs in particular. In essence, the Commission found AT&T's OCC tariffs contained numerous inconsistent rate elements and structures and that the rates charged OCCs were not cost supported and were unreasonably discriminatory. Since, in the rates filed on July 9, AT&T has failed to ameliorate these infirmities, do not the Commission's findings in Docket 79-246 preclude acceptance of these tariffs until those infirmities have been corrected?

Answer. Again, it would be inappropriate for me to comment directly upon this matter since the Commission is considering it at this time.

*Question 4.* Mr. Sharp, as you are well aware, the FCC presently has before it a proceeding involving a central aspect of the Fairness Doctrine. It is a proceeding, as I understand it, that is based upon a request by CBS that the Commission reverse a recent decision in the so-called *NCPAC* case. That case stated the rather obvious—that a broadcaster has an obligation to air contrasting views to those presented in a NCPAC ad, even if no one is willing to pay for the time. CBS has petitioned the FCC to hold instead that whenever a broadcaster sells time to a political party or a political action committee for an issue-oriented advertisement, even during times when there is no campaign underway, that there is no fairness obligation by the broadcaster to balance the views expressed in the advertisement unless someone is willing to pay for the time.

I have—I think the Congress would have—grave concerns about such a ruling, Mr. Sharp, since it would quite clearly remove ad, even if no one is willing to pay for the time. CBS has petitioned the FCC to hold instead that whenever a broadcaster sells time to a political party or a political action committee for an issue-oriented advertisement, even during times when there is no campaign underway, that there is no fairness obligation by the broadcaster to balance the views expressed in the advertisement unless someone is willing to pay for the time.

I have—I think the Congress would have—grave concern by the broadcaster to balance the views expressed in the advertisement unless someone is willing to pay for the time.

I have—I think the Congress would have—grave concerns about such a ruling, Mr. Sharp, since it would quite clearly remove the very heart of the Fairness Doctrine's obligations. Before I get to the merits, however, I want to understand more clearly the background of this request.

This controversy began when NCPAC filed a series of requests and complaints that finally resulted in the Commission's *NCPAC* decision. NCPAC appealed this ruling on May 24, 1982. On July 16, CBS wrote to you asking that the Commission seek a remand of the *NCPAC* case from the Court of Appeals. As you recall, you replied on July 26 by noting that CBS had raised no new issues and that the request would be denied. You did note, however, that CBS might instead seek a review of the policy in a separate request.

Four days later, on July 30, CBS did exactly that by filing a Request for Declaratory Ruling. On August 4, 1982, the Commission issued a Public Notice about the

CBS petition, seeking public comment. Only one day later, on August 5, NCPAC filed a request with the Court of Appeals to dismiss its case.

I set out that rather lenghty history, Mr. Sharp, because the timing of these events suggest that perhaps there is more here than meets the public's eye. Certainly, there is nothing procedurally defective or illegal if there was contact or off-the-record meetings between these parties. But I do believe the public should know about them. My first question, Mr. Sharp, is whether there were discussions between you or your office and counsel for CBS regarding the filing of the petition for Declaratory Ruling, prior to July 30, 1982?

What was the substance of those conversations?

Were any promises or representations made by you or your staff regarding the outcome of this proceeding or the position that the Office of the General Counsel would take?

Is this proceeding being handled by your office or is it being handled by the Broadcast Bureau?

NCPAC suffered three adverse rulings at the Commission, twice at the staff level and once by the full Commission. Each time it has pushed onward, seeking a reversal. It filed an appeal in the Court of Appeals to reverse an adverse ruling.

Yet, despite all these signs of tenacity, NCPAC files to withdraw its case in the Court. Now, it seems to me that even if NCPAC thought that it was going to get a reversal at the FCC, it would keep its options open by preserving its rights in Court. At minimum, it would appear sensible to ask the Court to stay the filing of briefs pending the FCC's action.

Why do you think NCPAC so willingly dropped its case in the Court of Appeals?

Where there discussions between you or your office and counsel for NCPAC prior to the withdrawal of the case?

What were the substance of those conversations?

Were any promises or assurances given by you or your staff regarding the outcome of this proceeding or the position that the Office of the General Counsel would take?

The Public Notice set August 27, 1982 as the deadline for comments on the CBS Petition. That deadline was extended to September 7, 1982, after several parties requested much longer extensions. In a somewhat similar proceeding involving political broadcasting laws, the Commission has issued a Notice of Inquiry prompted by a petition filed by Henry Geller. That Inquiry was decided on July 22, released on August 18. Comments are not due, however, until October 15 with a reply period until November 15. In view of the fact that the CBS issue centers on the relevant law during non-campaign periods, why is the Commission in such a hurry to resolve this proceeding?

Answer. On July 12, 1982 counsel for CBS, Inc. (intervenor in *NCPAC* v. *FCC*) met with Litigation Division attorneys handling the case to urge the Commission to seek a voluntary remand of the case. CBS counsel mentioned at that time the possibility that a petition for declaratory ruling might be filed. The primary thrust of the meeting, however, was the CBS request that the FCC seek a remand. Litigation Division attorneys told CBS counsel that any such request must be in writing.

On July 14, I received a telephone call from Donald Wear, a Vice-President of CBS, who informed me of CBS's intention to file a petition for declaratory ruling early in August. No mention of the remand request was made in this conversation.[1]

During this period Commission counsel had routine discussions with all counsel involved in the case concerning the conduct of the litigation.

Upon my return to the Office on July 26 I was informed of the request which had been filed July 16 by CBS counsel and, consistent with my policy concerning requests for voluntary remand, wrote that day to CBS counsel denying their request. Consistent with Commission policy, the letter pointed out the appropriate forum for raising the issues with which CBS was concerned.

FEDERAL COMMUNICATIONS COMMISSION,
*Washington, D.C., July 26, 1982.*

TIMOTHY B. DYK, Esquire,
*Wilmer, Cutler & Pickering,*
*Washington, D.C.*

DEAR MR. DYK: This letter responds to your request on behalf of CBS, Inc., dated July 16, 1982, that the Commission seek a remand of *National Conservative Political Action Committee* v. *FCC*, D.C. Cir. No. 82-1579.

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[1] I was out of town from July 11-23 on military duty.

I find nothing in your request which could not have been raised through intervention before the Commission's decision, upon reconsideration, or in the present petition for review. It would appear that these arguments would be addressed more properly to the Court of Appeals or in a separate request that the Commission review its entire policy concerning the applicability of the "Fairness Doctrine" to "political" broadcasts.

In consideration of the above-mentioned points, I am constrained to decline your invitation to seek a remand in this case.

Sincerely yours,

STEPHEN A. SHARP,
*General Counsel.*

At no time were any promises or representations made by me or my staff regarding the outcome of the proceeding or the position of the General Counsel. I did assure CBS that its views would be considered along with those of all others who filed concerning the request. In this instance the Commission issued a public notice in order to ensure that adequate comment was received. The proceeding is being handled by the Broadcast Bureau. Its draft order will be reviewed by the Office of the General Counsel pursuant to Commission rules for legal sufficiency when it is scheduled for Commission action.

I cannot speculate as to NCPAC's reasons for asking dismissal. NCPAC's motion, filed August 5, 1982, stated in relelvant part:

"In the light of the CBS petition and the reopening of this Fairness Doctrine issue at the FCC, NCPAC now seeks to dismiss without prejudice its petition in the instant case. In the NCPAC proceeding below, the Fairness Doctrine issue that has become NCPAC's sole issue on appeal was not the primary issue raised and was treated as a peripheral issue. By contrast, the proceeding initiated by the CBS petition addresses only this Fairness Doctrine issue and thus places this significant issue center-stage. NCPAC intends to participate in this new proceeding, which NCPAC believes will result in a more comprehensive consideration of the issue than occurred in NCPAC's case below." (Motion, at p. 3–4).

I had no discussions with NCPAC or its counsel at any time during the pendency of the case. The Associate General Counsel for Litigation, Daniel M. Armstrong, has informed me that at some point—probably after he learned that a petition for a declaratory ruling was going to be filed—he called counsel for NCPAC to advise her that if she wanted to hold the case in abeyance pending further developments at the FCC, or at least wanted more time to file NCPAC's opening brief, the Commission would not object to either motion.

After NCPAC decided to dismiss, it called to find out the Commission's position on the motion to dismiss. The lawyer assigned to the case recalls that Mr. Armstrong decided that NCPAC's counsel should be told that the Commission would not object to the granting of this motion.

As General Counsel I have generally viewed with disfavor requests for extension of time. This position is consistent with Commission Rule § 1.46 and allows the Commission more time to study the comments submitted. Detailed comments were received from a number of parties on September 7 and the Broadcast Bureau staff has begun a careful evaluation of them. I expect that the Bureau will proceed in the matter without undue delay. The timing of the Notice of Inquiry prompted by Mr. Geller's petition is a matter wholly within the discretion of the Broadcast Bureau.

*Question 5.* Your resumé indicates that you performed legal work for the National Broadcasting Corporation while you were in private practice. In what matters were you directly involved, even though you might not have signed filings or other documents, and will you recuse yourself when these matters come before the Commission?

Answer. To my best recollection none of the matters in which I was directly involved on behalf of NBC are still pending. I will continue to adhere to the recusal memorandum which I wrote upon becoming General Counsel in 1981, which made clear that I would not participate in any proceeding in which I had been directly involved for any client while at Schnader, Harrison, Segal and Lewis. My best recollection as to specific matters is that I participated in the following: Network Inquiry, *Kennedy for President* v. *FCC, Carter Mondale Reelection Committee* v. *FCC,* and *Committee for the Scientific Investigation of Claims of the Pananormal* v. *FCC.*

*Question 6.* The Commission has considered on many occasions increasing the hours of day time radio broadcaster stations. In fact, one such proceeding is now ongoing. What do you believe should be done to assist these day time radio operators?

Answer. At the present time, there is an ongoing notice and comment rulemaking proceeding that addresses many of the current restrictions imposed on daytime broadcasters. Thus, I do not want to prejudge the particular outcome of that proceeding. Suffice it to say, however that I will pay particular attention to the proposals for post-sunset operations at reduced power, and the revised basis for calculating pre-sunrise and post-sunset radiation toward protected stations. If the rulemaking record shows that daytime stations may expand their broadcast day without causing interference to other fulltime stations, then I expect the Commission will look favorably on these proposals.

*Question 7.* The Commission is being constantly asked to approve new services. What measures would you take to ensure that these proposals are considered and approved as rapidly as possible? Do you think the Commission should include in its calculation of whether these new services are in the public interest whether these new services would compete and thus take revenues from existing licensees?

Answer. I certainly believe that the public is well served by making available a greater diversity of program choices and communications services. As a Commissioner, I would be guided by two related principles in the process of approving new communications services for the marketplace. First, I will seek to promote maximum competition in the marketplace. And second, I oppose rules or policies which have as their primary purpose the protection of one competitor from another.

*Question 8.* There has been much discussion about the need to increase new entry overseas, yet because of the foreign postal and telephone monopolies we have made little progress. what steps would you like to see taken so that we could assist the entry of US carriers overseas?

Answer. The Commission should make every effort to pave the way for the best possible international telecommunications service. The Commission should, in cooperation with the Departments of State, of Commerce, and Defense, work to create an atmosphere most conducive to new entry through international cooperation and comity.

*Question 9.* Do you think the cable industry should be deregulated as to economic control by any level of government? Would you seek to abolish the current Commission rues dealing with cable, such as franchise fees and must carry? What are your views on cable copyright?

Answer. I can best respond to this question from the federal government perspective. In that light, I generally support deregulation of any federal regulation of cable television where that regulation is born of industry protectionism and does not otherwise benefit the public. These are two guidelines I will follow in the event I am called upon as Commissioner to vote whether to retain or abolish the Commission's franchise fees and must-carry rules. With respect to cable copyright legislation, I note that the House Energy and Commerce Committee recently voted to report H.R. 5949, which deals with the extent to which cable systems may retransmit copyrighted programs, and under what circumstances. I have not had an opportunity to study the language of H.R. 5949 and the committee report is due shortly.

*Question 10.* Do you oppose affirmative action as it relates to the broadcast industry and the Federal Communications Commission's regulatory role of enforcing its current rules?

Answer. No. See answers to NABOB questions.

*Question 11.* Do you support OMB's efforts to reduce the role of FCC in the area of affirmative action?

Answer. The FCC is an independent regulatory agency which does not report to the Executive Branch. We will consider the views of OMB as we will those of any other entity which wishes to present views on affirmative action. Every view will be given full and impartial consideration.

*Question 12.* Will you support minority ownership issues?

Answer. See answer to NABOB questions.

*Question 13.* Will you insure that the black employees, particularly the black professionals are given opportunities to advance in the Agency? Right now, the FCC is hostile to its black professionals whom they believe are mostly Democrats.

Answer. I will do what I can to ensure that all minorities are given opportunities to advance. I pointed out in my statement that the FCC needs to attract and retain "the best talent, regardless of political party affiliation." Attracting and retaining talent should also be done regardless of racial or ethnic background.

QUESTIONS OF SENATOR HATHAWAY AND THE ANSWERS THERETO

*Question 1.* Mr. Sharp, I have some questions about your views on the FCC's broadcast licensing policies—specifically, its comparative renewal process. As I understand the Communications Act, as interpreted by the Courts, the comparative renewal process is designed to foster competition and ensure that the public will receive the best possible service. Do you agree that the act, as now written, requires the FCC to utilize the comparative renewal process so as to promote competition and ensure that the public is served by the best qualified licensees?

Answer. The act, as interpreted by the courts, leaves the FCC with little choice but to use the comparative renewal process. I note that the Senate has passed S. 1629 which would modify the renewal process; but there has been no similar action in the House.

*Question 2.* Under the statute, do you believe the FCC acts lawfully when, for reasons of administrative convenience or otherwise, it denies the public an opportunity every three years to file competing applications against incumbent broadcasters whose licenses are not already tied up in hearing status?

Shouldn't the burden be upon the Commission to justify any instance in which it proposes to delay the opportunity for competing applicants to come forward and challenge existing licensees?

Once competing applications have been filed, shouldn't the burden be on the FCC to justify to Congress and the public and delay in the commencement of hearings on those applications?

Answer. These questions involve issues central to a case in litigation concerning how the Commission should proceed to determine the qualifications of RKO General, Inc. to continue to hold licenses for 13 broadcasting stations in light of the Commission's decision in June 1980 which disqualified RKO as the licensee of station WNAC-TV in Boston. The court of appeals has recently issued a decision which was adverse to the Commission, and the Commission is now considering whether to request the Solicitor General to file in the Supreme Court a petition for a writ of certiorari. Therefore it would be inappropriate for me to comment at this time.

*Question 3.* In judging between competing applicants in a comparative renewal hearing, how much weight do you believe an incumbent who has given only average performance is entitled to receive? How must weight should be given to the fact that one of the applicants is 51 percent or more minority-controlled? How much of a demerit should be given to an incumbent who has misled the Commission or otherwise misused its public trust?

If "average" performance in the sense that it is similar to the performance of most licensees can properly be found to constitute "meritorious" service to the public, then the Commission's policy has been and should continue to be one of attaching great weight to the public interest benefits of assuring the continuity of this meritorious service. Without having all the facts of a particular case, I cannot say that a meritorious record will guarantee renewal.

Minority control is a public interest factor to be weighed in favor of that applicant. However, its relative weight can be determined only in the context of all the facts in a particular case.

An incumbent who has misled the Commission or otherwise misused its public trust cannot be assured of renewal regardless of whether a competing application has been filed.

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QUESTIONS ON BEHALF OF THE NATIONAL ASSOCIATION OF BLACK OWNED BROADCASTERS, INC., AND THE ANSWERS THERETO

*Question 1.* Do you support the FCC's policies developed over the last decade which have encouraged minority ownership?

Answer. Yes. As I have often stated, I support the principle of diversity of ideas in the communications marketplace. In that regard, I support the Commission's minority ownership policies because an increase in minority involvement in broadcast stations may well increase the diversity of program choices and viewpoints available to the public.

*Question 2.* In particular, do you support the distress sale policy? The tax certificate policy? The additional credit or preference for minority applicants in comparative hearing consideration for new licenses? What steps would you take to improve and expand these policies?

Answer. I have stated my preference for using positive means to encourage the development of minority ownership. Tax certificates and preferences (in a hearing or lottery) as well as other initiatives designed to assist minority entrepreneurs in

raising capital and entering the marketplace are such positive means, and should be encouraged. To the extent that distress sales are available they should be approved, but our efforts to expand minority ownership must be directed to more positive areas.

*Question 3.* Do you support the FCC's policies encouraging the expansion of new opportunities for ownership in the communications arena? Specifically, do you support revision of the television rules to permit VHF TV drop-ins? Do you support revision of the FM rules to permit FM station drop-ins? Do you support minority preferences for these new services?

Answer. I generally support the expansion of new service to the public and, thus, new ownership opportunities. However, it would not be proper for me to make conclusory statements regarding two ongoing notice and comment rulemaking proceedings—the so-called VHF drop-in and FM drop-in proceedings. These proceedings concern the potential expansion of existing broadcast services—TV and FM—rather than a new service. Thus, the Commission's comparative hearing policy already provides for minority preferences and the newly-enacted lottery statute includes similar preferences.

*Question 4.* Would you expand the Commission's various minority ownership policies into all areas of communications licensing, such as MDS, mobile cellular radio, and paging services?

Answer. The recently-enacted lottery statute provides that minority preferences are to be applied only to those services where the content of the transmissions falls within the editorial control of the licensee. In general, MDS, mobile cellular radio, and paging services would not be included in that category. Thus, I defer to the judgment of Congress on this matter at this time.

*Question 5.* Would you support the Commission being given more regulatory control over cable television franchising?

Answer. State and local governments should have direct authority over cable television franchising in part because each cable service area is intrastate and such direct local authority is likely to make cable operators more responsive to local needs. There may be specific areas of regulation where a Federal presence is needed, but not in the franchising process itself.

*Question 6.* Do you support repeal of the fairness doctrine and section 315 of the Communication Act?

Answer. Yes.

*Question 7.* Do you support the continuation of FCC regulation of industry EEO practices? What steps would you take to improve industry EEO and FCC regulation of it? Do you support increasing the threshold for requiring the filing of FCC Form 395 about five employees? Have you ever been involved in EEO litigation? If so, please describe the circumstances surrounding that litigation and your role it.

Answer. FCC oversight of the EEO practices in the broadcast industry has been a positive influence on the industry in this area. I would like to take a close look at how the FCC is involved in this area and ways which would bring improvements in both Commission and industry performance. If I conclude that the Commission's EEO goals would be furthered by raising the threshhold for filing Form 395 from five to another figure I would support such a change. I have not been involved directly in any EEO litigation.

*Question 8.* What steps would you take to improve internal EEO at the Commission?

Answer. I will seek to insure that qualified minority employees are hired and promoted at the Commission.

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## Lobbying at the FCC: A Majority View

(By Dr. J. Clay Smith, Jr.) [1]

I am honored to participate in the Congressional Black Caucus (CBC) Braintrust on Communications as it relates to the Federal Communications Commission. The subject—How to Lobby and Participate in FCC Rulemaking—is timely. Since the Braintrust on Communications was initiated, the subject of access and participation

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[1] Former Associate General Counsel and Deputy Chief of The Cable Television Bureau at The Federal Communications Commission (FCC). Presently, Visiting Professor of Law at The Howard University School of Law. Before the Congressional Black Caucus Communications Braintrust, September 17, 1982, Rayburn Office Building, Washington, D.C.

in rulemaking and court proceedings has always been of vital interest to the CBC and its supporters.

I would like to focus my brief remarks on the word and the conduct associated with the word "lobbying" because the technique and the fairness of lobbying for regulatory effect must be clearly understood by minorities.[2] While I cannot because of time constraints go into any great detail here, let me say that the civil rights movement for social, economic and political change must shift and be most directly focused on regulatory agencies like the Federal Communications Commission for the remaining years of this decade. There is a quiet regulatory revolution ongoing which if not understood could create more severe economic barriers to entry into the telecommunications industry by minority citizens. In some instances, the regulatory climate is hostile to blacks and the attitude towards minorities is callous. So how do minorities lobby in this environment?

*Knowledge.*—The key to dealing with or participating in any FCC proceeding is to understand the issues for public comment. However, you must understand that those in the know understand that important rulemakings are always part of a larger regulatory agenda. You must ascertain from informed sources (The Chairman of the FCC, or the other Commissioners) what that larger picture is. You cannot lobby until you know what the larger picture is. In some instances the FCC Commissioners will not know until proposals for change are brought to them for policy consideration by the Chairman who controls the staff, and feeds to the media.

*Seek and you will find.*—Minorities are handicapped by the lack of access to the regulatory servants of the people, and regulatory arrogance. You can overcome regulatory arrogance by the seek and find method. The corporate interests do it exceedingly well—lobby through the back door. Our government is not a closed shop; it is open and as taxpayers you have a right to seek unrestricted information about how prospective actions of your government may affect you or the interests you represent. You should be allowed access to information and policy directions through the front door. However, if the Chairman or his staff, or the Commissioners or their staffs are not responsive, then you must seek out and utilize other approaches to gain access to public information such as by the use of the Freedom of Information Act or by requesting your Congressman to ask the questions for you.[3]

*Knock, and the door may be closed.*—You must understand that from administration to administration some interest groups (and particular people) have automatic access to the offices of the FCC Chairman and office heads. It's called politics. The best environment in which to lobby is where the decisionmaker wants to be lobbied. However, minorities (some but not all) have generally been misdirected to doors behind which their is little or incomplete knowledge. As a rule of thumb, if you knock on the door of a decisionmaker and you are directed elsewhere, you are generally walking away from the knowledge you need to know.

*Integrated lobbying.*—There are certain FCC regulatory issues (such as minority ownership) in which black Americans take a direct interest. The Chairman and the Commissioners at the FCC and relevant senior staff people expect blacks and other minorities to lobby on these issues, and they should. However, the various broadcast and nonbroadcast services do not expect minorities to lobby, say, against relaxing the cable cross ownership rules so that networks can own cable systems. What you must comprehend is that in order to understand the impact of proposed rules and the social and economic policies of the FCC, black interests cannot talk solely to each other.

*Blacks at the FCC .*—It is essential that the CBC and professional telecommunications groups, black and white alike monitor the progress of Black employees at the FCC. You will note that there is not a single black employee listed as speaker on this program. When I was asked to participate only a few days ago, I asked the CBC staff why this was so only to be told that the black employees were not allowed to participate as panelist here today. Why can't the CBC lobby blacks at the FCC?[4]

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[2] For your information, attached to these remarks is an FCC publication on "How FCC Rules Are Made." It contains a chart and a step-by-step explanation of the formal rulemaking process.

[3] Remember that the FCC is a creature of Congress. Both the Senate and the House have oversight committees over the FCC and the public may complain to these committees. Do not underestimate the power of a Congressional Oversight Committee. It is awesome. These committees can be effective, also.

[4] The CBC should know that the isolation of blacks from policy roles at the FCC isolates the CBC from its larger public role as lawmakers. This statement should not be interpreted as giving away restricted FCC information by its employees. But, ask yourself, when's the last time a member of the CBC sat down with a black employee at the FCC and had a general discussion on policy direction in the cable, broadcast, common carrier areas, or about appellate litigation of the agency?

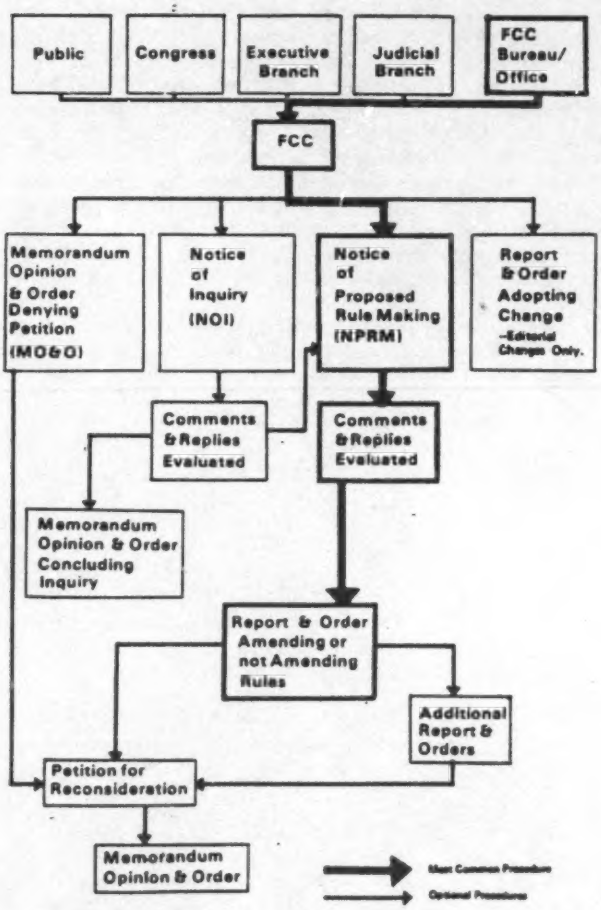
The CBC and interested groups should continue to request black employees (if that's who you want to address you) to attend your meetings and seminars. If your request is denied then find out why it is being denied. Remember you are partially responsible for the growth and development of the black professionals at the FCC. Don't let them down. There are far too few black lawyers and other classifications of professional black employees at the FCC. When you request that these employees participate in your workshops and your seminars, you are lobbying for their identity as employees at the FCC. You are lobbying for their First Amendment right of freedom of speech and association. What the FCC may not understand as yet is that it may need the support of the CBC to carry out its programs. A word to the wise should be sufficient.

In conclusion, there are far too few minorities in real policy roles at the FCC. By real policy roles, I mean personnel who are in confidential advisory slots in the office of the Chairman or the Commissioner's staffs or in the Office of the General Counsel. In fact there is only one black legal assistant at the Commission level (and the Commissioner for whom he works term expires soon). There are no blacks as office heads or at the bureau chief level, and only one black administrative law judge. It hasn't always been this way.

I conclude by urging each of you to lobby and to participate individually or in groups for the regulatory objectives and policies that protect your interests. If you don't—no one else will do it for you.[5]

[5] This is most regrettable because diversity in employment opportunities, programming and ownership are protected under the Commerce Clause and the First Amendment of the U.S. Constitution.

# How FCC Rules Are Made




* This brief account of how Rules are made at the FCC merely highlights the major components of the process. For details, contact the Docket Branch.

## Steps:

1. Initiation of Action. Suggestions for changes to the FCC Rules and Regulations can come from sources outside of the Commission either by formal petition, legislation, court decision, or informal suggestion. In addition, a Bureau/Office within the FCC can initiate a Rule Making proceeding on its own.

2. Bureau/Office Evaluation. When a petition for Rule Making is received, it is sent to the appropriate Bureau(s)/Office(s) for evaluation. If a Bureau/Office decides a particular petition is meritorious, it can request that Docket assign a Rule Making (RM) number to the petition. A similar request is made when a Bureau/Office decides to initiate a Rule Making procedure on its own. A weekly notice is issued listing all accepted petitions for Rule Making; the public has 30 days to submit comments. The Bureau/Office then has the option of generating an agenda item requesting one of four actions by the Commission. If an NOI or NPRM is issued, a Docket is instituted, and a Docket number is assigned.

3. Possible Commission Actions. Major changes to the Rules are presented to the public as either an NOI or NPRM. The Commission will issue an NOI when it is simply asking for information on a broad subject or trying to generate ideas on a given topic; an NPRM is issued when there is a specific change to the Rules being proposed. If an NOI is issued, it must be followed by either an NPRM or an MO&O concluding the inquiry.

4. Comments & Replies Evaluated. When an NOI or NPRM has been issued, the public is given the opportunity to comment initially, and then respond to the comments that are made. When the Commission does not receive sufficient comments to make a decision, a further NOI or NPRM may be issued, again calling for comments & replies. It may be determined that an oral argument before the Commission is needed to provide an opportunity for the public to testify before the Commission, as well as for the Bureau(s)/Office(s) to present diverse opinions concerning the proposed Rule change.

5. Report & Order Issued. A Report & Order is issued by the Commission stating the new or amended Rule, or stating that the Rules will not be changed. The proceeding may be terminated in whole or in part.

6. Additional Report & Orders Issued. The Commission may issue additional Report & Orders in the docket.

7. Reconsideration Given. Petitions for reconsideration may be filed by the public within 30 days; they are reviewed by the appropriate Bureau(s)/Office(s) and/or by the Commission.

8. Modifications Possible. As a result of its review of a petition for reconsideration, the Commission may issue a MO&O modifying its initial decision or denying the petition for reconsideration.